

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1425

To be argued by
DON D. BUCHWALD

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1425

UNITED STATES OF AMERICA,

Appellee,

—V.—

MICHAEL CAPANEGRO,

Defendant-Appellant.

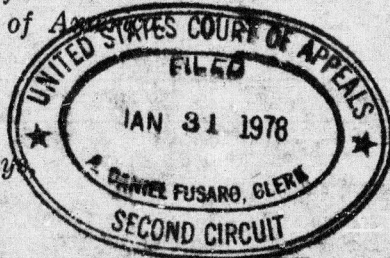
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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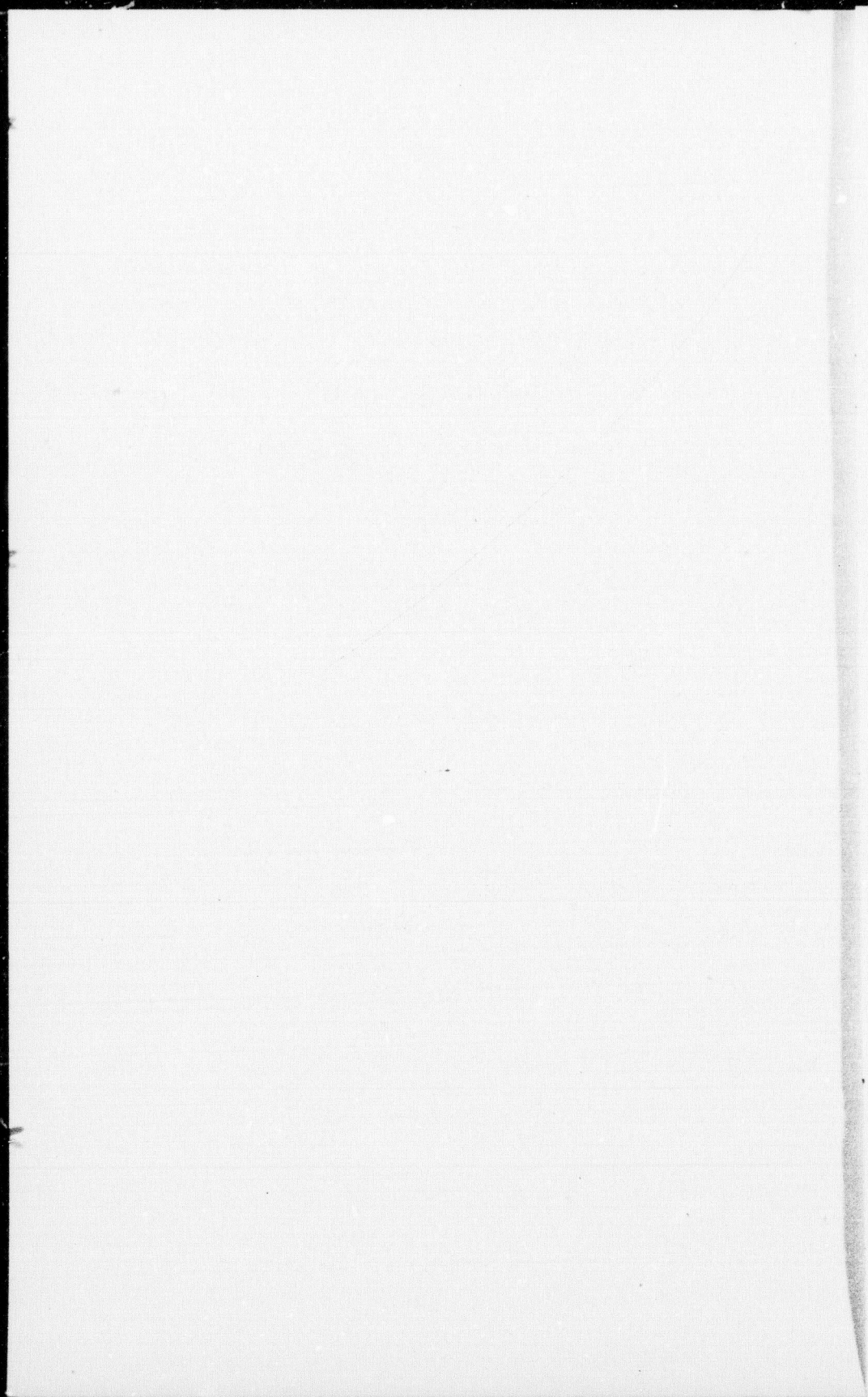


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UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL CAPANEGRO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Michael Capanegro appeals from a judgment of conviction entered on October 13, 1977, in the United States District Court for the Southern District of New York, after a ten day trial before the Honorable Thomas P. Griesa, United States District Judge, sitting without a jury.

Indictment 76 Cr. 914, filed September 24, 1976, charged Capanegro with 24 counts of embezzling, abstracting and converting monies of Local 1101 of the Communication Workers of America of which he was Chief Counsel, in violation of Title 29, United States Code, Section 501(c).

Trial commenced on June 20, 1977 and concluded on July 7, 1977 when the Court announced general findings of guilty on seventeen counts (Cts. 1-3, 5-8, 10-12, 15-17

and 21-24) and not guilty on seven counts (Cts. 4, 9, 13-14 and 18-20). In a 34 page opinion dated July 19, 1977, the Court filed special findings of fact pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure. (A. 3-36).*

On October 13, 1977 Judge Griesa sentenced Capanegro to concurrent terms of imprisonment of one year and a day on each count.** Capanegro is at liberty pending this appeal.

Statement of Facts

A. Synopsis

From April, 1971 through December, 1972 the defendant Michael Capanegro was Chief Counsel of Local 1101 of the Communication Workers of America ("Local 1101" or the "union") under a \$25,000-a-year retainer and acted as advisor to and confidant of the union's president, Ricky Carnivale. During an overlapping 4-1/2 month period ending in late February, 1972, he received an additional \$113,025.00 from the union for legal services allegedly performed by him in 45 cases on behalf of union members who became involved in criminal matters arising from strike-related activities.

To support fees in each case, which ranged from \$250.00 to \$5,400.00, and to deceive outside auditors who

* Page references with the prefix "A" refer to the Joint Appendix. "Tr." refers to the Trial Transcript; "GX" refers to a Government Exhibit at trial; "DX" refers to a Defense Exhibit at trial; "Br" refers to Appellant's Brief.

** On September 27, 1977, Capanegro had been sentenced to concurrent terms of one year imprisonment by Judge Griesa. (A. 61-77). The amendment of the sentence on October 13, 1977, enables Capanegro to become eligible for parole after serving four months. (A. 78-87).

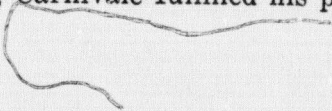
would be examining union strike expenditures when the strike ended, Capanegro submitted a series of detailed and individualized bills to the union, through Carnivale, which consistently misstated, overstated, and misrepresented the nature and substance of the services allegedly performed.

In submitting his falsified bills to Carnivale, copies of which were never sent to the individual members whom he allegedly represented, Capanegro knew that his descriptions of legal services rendered would go unquestioned. As retained Chief Counsel of Local 1101 it was Capanegro himself who undertook to negotiate legal fees with other attorneys who performed work for Local 1101 and it was Capanegro to whom bills from other attorneys were routinely referred.

During the lengthy investigation which preceded his indictment, Capanegro falsely claimed that the fraudulent bills had been composed by his secretary and that the erroneous descriptions of services rendered which appeared on the bills were in fact good faith estimates of services he intended to perform in the future. In addition, he fabricated evidence to suggest the performance of certain services which he had not actually performed.

B. Capanegro's Introduction to Local 1101

In early 1971, Capanegro, a former Assemblyman with a general legal practice, agreed to represent Ricky Carnivale free of charge in Carnivale's challenge to unseat the incumbent President of Local 1101. Capanegro's free representation was conditioned on his being appointed Chief Counsel to the union in the event Carnivale was successful. (Tr. 748-50, 754-56). When the re-election of the incumbent was overturned by the Labor Department and the Carnivale slate of candidates was certified in April 1971, Carnivale fulfilled his part of the bargain by



retaining Capanegro as Chief Counsel of the Local under an agreement in which Capanegro would receive \$25,000 annually. (A. 102-05; GXs 12, 13, 13A; Tr. 73-74, 90-91, 107, 757-60, 921).^{*} Prior to this employment by Local 1101, Capanegro had not practiced labor law. (Tr. 752-53, 911-12).

C. Union Payment of Members' Strike-Related Legal Fees

Local 1101, encompassing members who worked in Manhattan, Bronx and Brooklyn, was one of several local unions within District One of the Communication Workers of America ("CWA"). (Tr. 63-73).

In June 1971, just prior to the commencement of the seven-month strike, the members of Local 1101 voted to pay the legal fees of 18 members who had been arrested in connection with strike activities during a 13-day wild-cat strike in January 1971 under the prior administration. The local also voted for the union to pay strike-related legal fees which might be incurred by members in the future. (Tr. 639-42, 769-70, 925, 932, 972-74).

Thereafter, during the course of a seven-month strike, which lasted from July 14, 1971 through February 18, 1972, approximately 45 Local 1101 members were arrested in connection with strike-related activities. A few were charged with felony assault but the overwhelming majority were charged with either misdemeanors or violations under New York State law such as disorderly conduct or harassment. In addition, some other union members were involved in incidents which resulted in their becoming criminal complainants against telephone company employees who were not on strike.

^{*} The terms of the retainer agreement do not appear to cover representation by Capanegro of individual union members in criminal cases. (Tr. 107; GX 13; A. 103-05).

As each incident occurred, Carnivale and other Local 1101 officers referred the individual member to Capanegro or advised Capanegro that a particular union member had been involved in a strike related incident.* Thereafter Capanegro submitted bills to the local for his alleged representation of the union member. (A. 88-102; GXs 1-7). These bills were paid from the Local 1101 Defense Fund which contained monies advanced by the CWA to support striking members and to meet local strike expenses. (Tr. 66-70, 77-79).

In those instances where Capanegro actually made court appearances on behalf of members, his notices of appearance uniformly stated that he had been retained by CWA Local 1101. (GXs 1104, 1206, 1303, 1807, 1907, 3004, 3802, 4103, 4203, 4303; A. 159). Similarly, in the only legal papers ever submitted by Capanegro in connection with his representation of arrested strikers—affidavits for adjournments—Capanegro consistently described himself as Chief Counsel of Local 1101. (GXs 400-A, 1403, 1406, 1803, 1908, 2507, 2515, 2800-B1, 3309, 4000-Q, 4204, 5000-C; A. 160).

During the final 4-1/2 months of the strike, Capanegro submitted bills to Local 1101 containing some 54 items totaling \$100,425. Between October 21, 1971 and February 29, 1972, Capanegro, in addition to the monies paid him under his Retainer Agreement, received 45 checks totaling \$113,025 from the Local 1101 Defense Fund (GXs 10A, B, C, D).** Approximately \$47,000 of

* For some reason, Local 1101 did not avail itself of the services of the law firm of Cohen, Glickstein, Lurie, and Ostrin, CWA's lawyers in the New York City area, who were available to represent arrested strikers at no cost to the Local. Under the existing arrangement, this law firm would bill the CWA directly, through District One, on an hourly basis. The firm did represent arrested strikers from some of the other locals within District One. (Tr. 81-92, 115-17, 159).

** One \$3,600.00 Defense Fund check could not be tied into any item on Capanegro's bills. (Tr. 1357-59; GX 10B).

the \$113,025 was paid with checks drawn on the Defense Fund in the last two weeks of February, after the strike had ended. (Tr. 173-74).*

Only Capanegro and one other attorney** received money from the Local 1101 Defense Fund for representing arrested members during the seven-month strike. Bills submitted by other attorneys for representation of arrested 1101 members were referred to Capanegro by Carnivale both before and during the seven-month strike.*** Capanegro was aware that his own bills would not be

* The strike ended on February 18, 1972. Under Defense Fund Rules, however, locals could still make disbursements from the Defense Fund until members received their first pay checks following the strike. (Tr. 131).

** The other attorney, Richard Friedman, received \$1,000 from the Defense Fund after presenting union member Joseph McAleer with a bill for that amount. (Tr. 669-70, 702-03). In early 1973, Capanegro sent Friedman an additional \$1,500 of the \$4,500 Capanegro had himself obtained from the Defense Fund for allegedly representing McAleer. (Tr. 673-76). See "Count Twenty-Four", *infra*, pp. 45-48.

*** When Carnivale took office, he referred to Capanegro a \$5,000 bill received from the law firm of Kaming & Cunningham, which was representing 18 wildcat strikers arrested in January 1971 in connection with their continuing court proceedings. As of the April 23, 1971 date of the bill, the law firm stated it had expended 47 hours in court and 5 trials were anticipated. (GX 46A; A. 140-42). Capanegro thereafter entered into a written agreement with Kaming & Cunningham under which Local 1101 agreed to pay the firm a total of \$18,000 at various intervals as designated numbers of the cases were concluded. In addition, Capanegro authorized Kaming & Cunningham to initiate restoration proceedings at \$750 per case to reinstate three of the wildcat strikers who had been fired by the Company. This agreement was also reduced to writing. The law firm was required to keep Capanegro apprised of developments in all the cases. Despite repeated requests by Kaming & Cunningham, its total bill of \$20,250 was not paid in full by Local 1101 until January, 1973, after Carnivale had left office. (Tr. 970-89; GXs 46A-F; A. 140-56; DXs A, B).

[Footnote continued on following page]

scrutinized at the union and that his false descriptions of services rendered would go unchallenged.*

D. Capanegro's Bills

Capanegro usually presented his bills directly to Carnivale. He did not send copies of the bills to the individual members whom he allegedly represented. Carnivale himself (as opposed to a Committee "check writer") wrote out over \$100,000.00 of the Defense Fund checks to Capanegro.** The stamped facsimile signature of Local

In another situation during the seven-month strike, an attorney by the name of David Rubin submitted \$200 bills to Local 1101 for representing union members Gallo and Goodman at Criminal Court arraignments on the weekend of September 26, 1971. (Unlike Capanegro, Rubin sent copies of the bills to the two union members themselves). The bills were not paid but, instead, forwarded by Carnivale to Capanegro. Capanegro was thereafter substituted as counsel in the case, billing (GX1) and receiving \$6,000 from the union (GXs 47A, 47B, 2790; A. 157-58; Tr. 522-25, 621-22, 635-37, 1333-35, 1338).

* In his letter to United States Attorney Paul J. Curran dated April 23, 1975, Capanegro wrote: "I submit to you that very few businessmen of any nature ever go behind their lawyer's bill and question it. . . . I am a respected member of the Bar and when I submitted my bills to Mr. Carnivale, he looked at them and assumed that they were right and proper." (A. 127; GX 14B; Tr. 965-66, 970). At the trial, Capanegro acknowledged writing the letter, but claimed that he was in fact under the impression when he submitted his bills that they would be given the strongest scrutiny. (Tr. 964-66).

** Capanegro's bills were paid differently than other strike-related bills. Under established procedures local members with outstanding bills during a strike would present the unpaid bills to "interviewers" from the committee who would verify the bills and determine if under the CWA Defense Fund Rules it could be paid by the union. Where such a determination was made, "check writers" on the committee would write out checks on the local's Defense Fund account and make notations on the member's Defense Fund Assistance Card of the date, amount, check number and nature of the expense paid by the union on the individual member's behalf. Checks to pay general union strike expenses also were prepared by "check writers". Either Carnivale or the local treasurer would then sign the check. (Tr. 620-21, 623, 829-30, 849-54, 865-66).

1101 Treasurer James Fitzgerald appeared on all but three of the checks. Carnivale signed them all. No other category of Local 1101 Defense Fund checks were personally written out and signed by Carnivale with such regularity. (Tr. 625-32, 638-39, 647, 830, 850-54, 934-35; GX 10B).

The bills (GXs 1-7; A. 88-102) were written in the past tense and contained individualized descriptions of work allegedly performed in the particular case. Capanegro never met or spoke with some of the individuals for whom he submitted a bill to Local 1101.* In other instances, notwithstanding detailed descriptions of services rendered which appeared in the bill, his only connection with a case was to speak a single time with a union member on the telephone and advise the member to file a complaint with the police department.** In other instances, Capanegro appeared briefly in court with members whose cases were quickly Adjourned in Contemplation of Dismissal ("ACD") and *thereafter* Capanegro submitted bills to the union falsely claiming multiple court appearances and trials in connection with the case.*** In yet other instances, within one or two days of learning of the arrest of a particular union member (including members he had never met or spoken with), Capanegro submitted bills to Carnivale setting forth claimed services which Capanegro had not performed and knew he would never perform.**** While several of his bills claimed preparation of legal memoranda or legal briefs, not a single brief or memorandum was prepared or filed by Capanegro in connection

* See, e.g., the bills for Dolgin (Ct. 6), Hevenor (Ct. 7), Franco (Ct. 8), Harold (Ct. 2), Carlo (Ct. 3) and Gilbert (GX 3190; Tr. 1381-84).

** See, e.g., the bills for Radloff (Ct. 5) and Hyland (Ct. 10).

*** See, e.g., the bills for Cassidy (Ct. 11), Toomey (Ct. 12), Neri (Ct. 15), Wallen (Ct. 16), Dzubay (Ct. 17) and Adler (GX 3990).

**** See, e.g., the bills for Rosso (Ct. 1), Harold (Ct. 2), Carlo (Ct. 3), Antonucci (Ct. 22), Russek (Ct. 23) and McAleer (Ct. 24).

with any of the individuals whom Capanegro claimed to represent in his billings.* On various bills, Capanegro claimed falsely to have made appearances at police stations,** or to have appeared at hearings,*** or to have had conferences with witnesses.**** Some individuals who Capanegro claimed in his billings to have represented were in fact represented by other attorneys.*****

E. Developments After the Strike—Exposure of Capanegro's Fraud

The CWA International first became aware of the extent of Capanegro's billings a few months after the strike. In order to prepare for arbitration proceedings following the strike CWA's own lawyers***** requested that Carnivale provide them with all relevant information pertaining to the cases of arrested Local 1101 members. In response to this request, Carnivale provided only Capanegro's bills containing fictitious descriptions of services rendered. (Tr. 131-41; GXs 25-28). After further requests, the CWA lawyers finally received one page "Resumes" prepared by Capanegro of only five Local 1101 cases. (GXs 27-28; Tr. 1286, 1292).*****

* See, e.g., the bills for Radloff (Ct. 5), Whyte (GX 3890), and Zuckerman (GX 3490).

** See, e.g., the bills for Rosso (Ct. 1), Hommel (GX 2890), Byrd (GX 2990), Lapides (GX 3090) and Gilbert (GX 3190).

*** See, e.g., the bills for Hyland (Ct. 10) and Russek (Ct. 23).

**** See, e.g., the bills for Pomposello (Ct. 19) and McAleer (Ct. 24).

***** See, e.g., the bills for Rosso (Ct. 1), Antonucci (Ct. 22), McAleer (Ct. 24) and Gilbert (GX 3190; Tr. 1381-84).

***** These same CWA lawyers had represented arrested members from locals other than 1101 during the strike. See *supra*, p. 5. n.

***** At least one "Resume" evidenced a total lack of familiarity with the actual case by Capanegro. See "Count Twenty-Four" *infra*, pp. 45-48.

Capanegro's fraudulent billings were exposed further during the Local 1101 election campaign in September, 1972 when a list of Capanegro's legal bills was published by a slate of candidates opposed to Carnivale. (Tr. 74, 143-47, 186-88; GX 15). Two weeks after this public release of Capanegro's bills, Capanegro gave \$5,000 checks to both Carnivale and Carnivale's top assistant at Local 1101, Larry Lanaro. (GXs 22, 24; Tr. 634, 860-61). Both checks bore the handwritten notation on the back "Loan to be repaid upon demand." Capanegro insisted at trial that the check to Carnivale was a \$5,000 loan to cover campaign expenses. (Tr. 794, 1362-65). Capanegro claimed that the check to Lanaro was a loan to help defray Lanaro's legal fees for representation on arson charges (unrelated to the union) arising out of the firebombing of an automobile in Suffolk County (Tr. 690, 795-96, 1365-67).^{*} Through 1975, however, Capanegro had not been paid nor had he sought repayment of either "loan". (Tr. 794-96, 1362-67, 1370-71).

Carnivale lost in his bid for re-election. (Tr. 74). In early 1973, following the post-strike audit conducted by an accounting firm, the CWA brought Capanegro's bills to the attention of the Department of Labor (Tr. 149, 179), and in late 1973, the new officers of Local 1101 commenced a lawsuit on behalf of 1101 against Carnivale and Capanegro. (Tr. 867-71, 895).

In early 1975, during the course of the criminal investigation, Capanegro wrote a series of letters to the United States Attorney's Office trying to shift responsibility for authorship of his bills to his former secretary, Judith Kisarewski (GXs 14A, 14B; A. 106-30):

"My secretary prepared all retainer bills in most instances when the client called and phrased the

^{*} The Lanaro check was in fact endorsed over to and deposited by Richard Friedman, Lanaro's attorney in the firebombing incident. (Tr. 706-07, 718-20).

bills on the work to be done." (Tr. 944, 949; A. 112).

"I set up a procedure with my secretary to send out a form retainer when a call came in from a union member to represent him on a criminal matter. As the calls came in a record would be made on it and sometime thereafter a retainer would be sent out to the union." (Tr. 949-50; A. 118).

"When the calls came in for representation my secretary sometimes immediately sent out retainers which were to the effect: 'As and for appearances in court, picking a jury, trial of the action, \$1,500.'" (Tr. 950; A. 118-19).

"In some instances I was successful in getting New York Telephone to withdraw charges or the matter just never came about. My secretary sent the retainers. She and I were under the impression that the case would develop as all of the other fifty or so did." (Tr. 950; A. 119).

"The bills went out because members called in for legal help and my secretary composed a bill from each phone call." (Tr. 951; A. 120).

Capanegro visited his former secretary at her home on December 16, 1975, the night before her scheduled grand jury appearance. Capanegro testified at trial that he "told her to tell the truth about what she did and what we did together." Capanegro tried to visit her again after the grand jury appearance but she was very upset about his letters to the prosecutors she now had seen which alleged that she phrased the fraudulent bills. (Tr. 954-57).

The next week Capanegro settled the civil suit for \$5,000. (GX 14C; DXC; Tr. 1393-94). On December 30, 1975, he wrote a letter to the grand jury (with a

copy to his secretary) advising of the settlement and concluding with the following paragraph:

"I also wish to inform you that if you are under the impression or if any of my previous communications to you implied that my secretary had anything more to do than to write out and type up the procedures which I had dictated and set up for her, then you are acting under a misapprehension. All the correspondence, all of the retainer bills, all of the amounts thereon and the procedures for sending them out were set up by me. My secretary was merely a conduit of my office procedures. She had no choice except to carry out the procedures that I set up for her." (GX 14C; A. 133; Tr. 958).

At the trial, Capanegro conceded on cross-examination that he personally dictated the bills including the descriptions in the body of the bill and the amounts and that they were not composed by his secretary. (Tr. 937-43). He denied futilely that he was attempting to mislead anyone through his letters to the prosecutors. (Tr. 952).

F. Defense Contentions

Capanegro contended at trial that his bills for the most part contained good faith estimates of work he expected to perform in the future. (Tr. 779-81). He claimed that when cases first started coming in he had explicitly advised Carnivale * that he would charge up to \$2,000 for each misdemeanor or violation case. (Tr. 771-72, 925). In his earlier letters to the prosecutors, however, he had written: "Carnivale never knew beforehand who, how,

* Carnivale had been subpoenaed by the Government and already had advised the Court of his intention to plead the Fifth Amendment. (Tr. 438-39).

when or where a client came from or when or what the amount of a bill was to be rendered." (GXs 14A, 14B; A. 112).*

G. The Counts of the Indictment **

The evidence with respect to the 24 counts of the Indictment was as follows:

* In the next section of the "Statement of Facts" we have summarized Capanegro's testimony relating to the legal bills which are the subject of the individual counts of the indictment. In addition to Capanegro's own testimony, the defense called six character witnesses (Tr. 692-743, 890-94), attorney Richard Friedman (Tr. 701-21) whose testimony related to Count 24 (see, *infra*, pp. 45-48) and Local 1101 Defense Fund Committee Chairman Lawrence Bittman (Tr. 819-66). On direct examination, Bittman testified that in late 1972, after the opposition slate had published Capanegro's legal bills, Capanegro told him that he was willing to talk to anybody about the complaints. (Tr. 822-23). During cross-examination, Bittman testified that he had not approved any of Capanegro's bills, that he was unaware of the bills until he saw the opposition slate campaign leaflet, and that he didn't even believe the leaflet until after the Main, Lafrantz audit (Tr. 827-29, 834-35, 860). During the strike, Capanegro agreed to handle a divorce proceeding for Bittman free of charge, thereafter drawing up the divorce papers and appearing for Bittman two or three times in court. (Tr. 840-42).

** The indictment focused on 24 of the 54 items in Capanegro's bills, totalling \$36,900. The individual union members whom Capanegro submitted bills for in these 24 instances testified at trial. Certain attorneys who in fact had represented some of these members also testified.

With respect to each of the 54 billed items, the Government introduced into evidence all relevant police reports and court papers. (GX 97). In addition, the Government introduced detailed summaries of this evidence pertaining to all of the billed items beyond the 24 included in the indictment. (Tr. 1347-49). The similar act evidence was offered to negate any defense suggestion that fees for non-existent work in some cases were offset by lower fees in other more time-consuming or difficult cases. (Tr. 53-57, 813-16, 875-77, 886-87, 1347-49, 1354-55, 1475-76).

[Footnote continued on following page]

Count One: Michael Rosso (Guilty)

Robert Michael Rosso was arrested on December 3, 1971 while picketing at MacArthur Airport in Suffolk County with members of brother Local 1108. He was taken to the 3rd Precinct in Bayshore, charged with disorderly conduct (a violation), and given a desk appearance ticket requiring him to appear for arraignment on December 8, 1971 at the First District Court in Hauppauge, Long Island. (Tr. 333-34; GXs 102, 104, 116).

Rosso appeared in court on December 8, 1971 without an attorney. A colleague from Local 1108 posted \$50.00 bail for Rosso. (Tr. 334-35; GX 113). Sometime after his court appearance in Hauppauge, Rosso called Capanegro's office, the phone number having been furnished to Rosso by Local 1101. He spoke with Capanegro

The District Court also had before it all of Capanegro's legal files in the various cases. The files had been turned over by Capanegro to federal prosecutors on February 26, 1975. (GX 99). They generally consisted of a file folder and one or two pieces of paper. The files for all of the Local 1101 members Capanegro billed for could be held in one hand. In some instances the files contained entries which the Government claimed were belatedly made by Capanegro after he learned about the Labor Department's investigation of his bills. (See footnotes at pp. 21, 24, 25-26, 44, *infra*).

Notwithstanding prior protestations that all of his files, records and diaries were in the possession of the United States Attorney's Office (Tr. 1193-94), Capanegro produced for the first time during his own trial testimony a set of diaries and message books. (Tr. 1030-33). All entries pertaining to union matters from these books were also received in evidence. (DXs J, K.; Tr. 1352-54). The Government argued that at least one of these entries was also faked. (Tr. 1279-84, 1354, 1361-62, 1429-34; GX 2350). See, "Count Twenty-Three", *infra*, pp. 43-44. Prior to imposing sentence on September 27, 1977, Judge Griesa noted that "both before and during the trial Mr. Capanegro falsified and fabricated evidence." (Transcript of Sentencing, Sept. 27, 1977, p. 12; A. 72).

Finally, all of Capanegro's bills to the union (GXs 1-7) were also in evidence. (A. 88-102).

on the phone for five minutes and in a second and final telephone conversation between the two shortly thereafter, Capanegro gave Rosso the name of Suffolk County attorney John Clayton to call. (Tr. 336-38).

In between the two telephone conversations with Rosso, Capanegro had called Clayton, an attorney he never previously had met. (Tr. 353, 994). Capanegro advised Clayton that he was Chief Counsel of Local 1101 and of the circumstances of the strike. He asked Clayton to represent Rosso but urged Clayton to keep his bill down in view of the economic situation caused by the strike. Clayton agreed to represent Rosso for \$250.00 in accordance with the then existing minimum fee schedule but insisted that Rosso contact him first so that he would not be in the position of soliciting business. Capanegro told Clayton to send him (Capanegro) the bill. (Tr. 353-54, 372, 383, 994).

After obtaining Clayton's name during his second phone conversation with Capanegro, Rosso called Clayton on December 13th. On December 15, 1971 Clayton interviewed Rosso at his office and the same day sent Capanegro a letter thanking Capanegro for the referral and enclosing a bill for \$250.00. (Tr. 337-38, 355-58; GXs 155, 100-A).

On the very next day Capanegro personally received payment from Carnivale of \$1,850.00 based on the following bill dated December 10, 1971 (GX 2; A. 89).*

* It was unclear whether or not Capanegro had agreed on a \$250.00 fee with Clayton as of the December 10th date on the bill but Capanegro conceded on cross-examination that as of the time of the bill he had no intention of personally representing Rosso and intended that this Suffolk County matter be handled by another attorney. (Tr. 995-99). In any event, by December 16, 1971, when Capanegro received his \$1,850.00 payment from the union for the Rosso case, he had already established the \$250.00 figure with Clayton. (Tr. 1399-1400; GXs 155, 100A).

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

MICHAEL ROSSO

As and for all negotiations and conferences; appearances at Police Station; appearances in Court; preparation for trial and appearances on Trial Dates for Criminal charges in Riverhead: \$1,850.00"

On January 4, 1972, upon his return from a two-week honeymoon in Switzerland, Capanegro mailed Clayton a check for \$250. (Tr. 340, 347-48, 362, 917-18; GXs 157, 170). Capanegro's involvement in the Rosso case was limited to his two telephone conversations with Rosso and the one telephone conversation with Clayton. (Tr. 340, 347-48, 362). Capanegro never returned to Local 1101 any part of the difference between the \$1,850.00 he received and the \$250.00 he paid out to Clayton. (Tr. 995-1001). Clayton represented Rosso throughout the litigation and on March 24, 1972, Rosso received an Adjournment in Contemplation of Dismissal ("ACD"). (Tr. 339, 361-62; GXs 110, 114, 115).

Capanegro claimed that his Rosso bill was an "in futuro" bill; that his references to "appearances at Police Station" were the result of a mistaken belief that under Suffolk County practice, Rosso would have to reappear again at the precinct house; that the negotiations, conferences, court, trial and police station appearances referred to in the bill were items which he contemplated that Clayton would attend to; that he considered Clayton to be his "associate"; that he did not believe it necessary to refer to Clayton in the bill; and that his \$1,850.00 fee

was appropriate irrespective of what the other lawyer had charged (Tr. 991-1000, 1375-80).*

In his special findings, Judge Griesa concluded that "Capanegro submitted the Rosso item knowing that it was almost entirely a statement of services which he had not rendered and had no intention of rendering" and that "Capanegro obtained payment of \$1,850 which he knew he was not entitled to." (A. 7-8).

Counts Two and Three: Harold and Carlo (Guilty)

On December 13, 1971 Lloyd Harold and Frank Carlo were arrested while on picket duty and charged with disorderly conduct and harassment (violations). They were released from the precinct with desk appearance tickets instructing them to return to court on December 22, 1971. (Tr. 384-89, 408-10; GXs 202, 302).

Harold obtained Capanegro's name from the union, called his office for an appointment, and on December 15, 1971, without meeting Capanegro, obtained from Capanegro's secretary an affidavit signed by Capanegro requesting an adjournment until January 11, 1972. (Tr. 392-93; GX 200-A). Harold testified that he never spoke with Capanegro at any time or any subject. (Tr. 398).

On December 16, 1971, Capanegro hand-carried to Carnivale and received payment based on two bills for alleged representation of Harold and Carlo totaling \$2,600.00. The bills stated (GX 3):

* In early 1974, after the Labor Department investigation of Capanegro had begun, Clayton heard from Capanegro. Capanegro suggested that Clayton not cooperate with the Department of Labor investigators and instead invoke an attorney-client and attorney-attorney privilege. Clayton did properly insist on a waiver of the attorney-client privilege by Rosso (which was furnished) but scoffed at the notion that his own December 1971 telephone conversation with Capanegro was privileged (Tr. 365-67, 375-78).

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

LLOYD HAROLD AND FRANK CARLO

As and for all negotiations and conferences; appearances in Court; Preparation for Trial and appearances on trial dates for Criminal Charges in re LLOYD HAROLD;	\$1,300.00
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As and for all negotiations and conferences; appearances in Court; Preparation for Trial and appearances on Trial dates for Criminal Charges in re FRANK CARLO:	\$1,300.00
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Total Due \$2,600.00"

After Capanegro received the \$2,600, Capanegro had nothing more to do with the case. On December 19, 1971 Capanegro left on his honeymoon for Switzerland. (Tr. 917-18). On December 22, 1971, Harold and Carlo appeared in court. Carlo had spoken with Capanegro's secretary on the telephone the preceding day and had been told not to worry. Not having an affidavit of adjournment, however, he was particularly apprehensive when no attorney showed up for him in court. (Tr. 394, 412-13). Carlo testified that he never went to Capanegro's office and never communicated with Capanegro in person or on the telephone at any time in connection with the case. (Tr. 412, 415).*

* Carlo called the union and complained about not having a lawyer. Attorney Alfred Udoff came to the Bronx courthouse. He handled Workmen's Compensation matters for Local 1101, was not a criminal lawyer, and had no prior knowledge of the case (Tr. 395, 413, 1041-42). Harold did not submit his adjournment

[Footnote continued on following page]

Capanegro admitted never having met or spoken with Carlo about the case (Tr. 1041, 1051) and never having met with Harold. (Tr. 1051). He claimed, however, that he "probably" had spoken with Harold on the telephone on December 14th or 15th (Tr. 1030, 1037-38) and that references to "conferences" on the bills he submitted included "conferencing" clients on the telephone. (Tr. 1034, 1104-05). Capanegro contended that the December 16th bill was an "in futuro" bill reflecting work he contemplated having to perform thereafter and that, in fact, before leaving for Switzerland (on December 19th), he discussed the case with an Assistant District Attorney in the Bronx who happened to be in the part where Harold and Carlo were scheduled to appear on December 22nd. Capanegro claimed that he did this in order to get the feeling of the District Attorney on "how he was disposed to these union matters" (Tr. 1051-56). Capanegro, however, did not recall the name of the A.D.A. he spoke with and had no notation in his diary or legal file of any such meeting. (Tr. 1058).

In his special findings, the District Judge found "I will give Capanegro the benefit of the doubt as to conversing with Harold, but I reject the contention that the defendant talked to the Assistant District Attorney." (A. 9). The District Court concluded that Capanegro knew that his bill set forth services which had not been rendered and that the items for Harold and Carlo had

affidavit and Udoff represented Harold and Carlo when the case was called. After a very brief appearance before the Judge, Harold and Carlo both received ACD's. (Tr. 396-97, 414-15; GXs 205, 304).

Capanegro's secretary was advised of the disposition on the telephone and made a handwritten entry on Capanegro's legal file folder that the case was ACD'd and "case marked by legal aid society if they do not get in trouble within 6 months everything all right", which Capanegro saw sometime after returning from Switzerland. Attorney Alfred Udoff was never paid for his appearance and Capanegro never returned any portion of the \$2,600.00 he had received from Carnivale. (Tr. 1042-51; GX 200).

been separately stated to inflate the fee. The Court rejected the defense contention that in this instance the bill was intended as a "good faith" estimate of services to be performed. (A. 10).

Count Four: Lincoln, Ast and Fittipaldi (Not Guilty)

On January 3, 1972 union members Ast, Lincoln and Fittipaldi were involved in a picket line incident which resulted in the arrests of three so-called "scabs" on charges of felonious assault. Lincoln was injured and hospitalized in the incident and Ast was the complainant. (Tr. 422-26, 540; GX 402).

Following his return from Switzerland Capanegro met Lincoln briefly at the union offices. (Tr. 426, 1067). He also conferred briefly with all three union members in court on January 6, 1972 when the preliminary hearing was scheduled for the three non-union defendants. Capanegro also introduced the three union members to the Assistant District Attorney who was handling the case and spoke with the A.D.A. (Tr. 426-28, 1066-71, 1079).*

On January 7, 1972 Capanegro submitted the following bill to Local 1101 for his services (GX 4):

"FOR PROFESSIONAL SERVICES RENDERED IN RE:

AS AND FOR negotiations, conferences
and advice in regard to Criminal
Charges by Nick Fittipaldi, ROBERT
AST, and DENNIS LINCOLN in re Tele-
phone Company

1,000.00"

* The union members refuted Capanegro's claim that he had watched part of the court proceedings involving the non-union defendants. (Tr. 427, 542, 1087-88). Capanegro also claimed to have had subsequent conversations and conferences with Lincoln pertaining to the latter's scheduled February 23, 1972 Grand Jury appearance in the case. (Tr. 1088-89, 1092-1101). Lincoln, however, denied that he had any further contact with Capanegro after January 6th. (Tr. 428-430).

In acquitting on this Count the District Court wrote:

"I cannot find beyond a reasonable doubt that the description of services was false. As to the \$1,000 fee, although it would appear high in relation to the amount of services performed, I cannot find beyond a reasonable doubt that Capanegro knew he was not entitled to this fee." (A. 11).

Count Five: Paul Radloff (Guilty)

In mid-December 1971, Paul Radloff, while on picket duty, was brushed by an automobile driven by company employee Jeffery Yee. (Tr. 196, 204). The next day Radloff and Carnivale telephoned Capanegro. (Tr. 197-98). Radloff told Capanegro about the incident and Capanegro advised him to file a complaint against Yee. (Tr. 206-09, 1104-06). Radloff decided not to file a complaint, and a few days later, after doing nothing, he left a message at the local for Carnivale or Capanegro to call him. No one ever got back in touch with him. (Tr. 212-13). Other than the single phone conversation with Radloff from Carnivale's office, Capanegro had no other contact with Radloff or anyone else about the case. (Tr. 220, 229).^{*} No case was ever instituted. (Tr. 1103-04).

^{*} Capanegro did have a vague recollection about having checked with the 112th Precinct to see if Radloff had filed a complaint. (Tr. 1110-11). The lone piece of paper in Capanegro's legal file relating to Radloff bore the following notation in Capanegro's handwriting. (Tr. 1102-03; GX 500-A):

"Advised make complaint, go to police station, Queens 112 Pct., I will appear if necessary."

Capanegro denied that this was an entry in the legal file which he made in 1974 after learning he was under investigation by the Labor Department. (Tr. 1103). The 112th precinct, however, is in Queens and would be out of the area of where the incident occurred which was in the 77th precinct in Brooklyn. (Tr. 196, 208, 213-14).

On January 7, 1972, several weeks *after* the incident, Capanegro submitted the following \$1,075.00 bill to the union which was paid on January 26, 1972 (GX 4):

"AS AND FOR PROFESSIONAL SERVICES
RENDERED IN RE:

all conferences, negotiations and appearances at hearing; appearance at arraignment for charges involving Paul Radloff, felonious assault charges; advice and legal briefs in regard thereto:

1,075.00"

Capanegro admitted never having met Radloff (Tr. 1110) but claimed that, in the language of the bill, he did in fact have a "conference" with Radloff, to wit, his "conference" on the telephone. (Tr. 1104-05). Notwithstanding Radloff's testimony that the incident had occurred in mid-December (Tr. 196, 204), Capanegro asserted that his January 7th bill was "in futuro" *; in his mind he "was finished with the case" until Radloff came back to him. (Tr. 1106). He submitted the \$1,075.00 bill, he maintained, because when he opened up a file he "kept himself available" and "that's worth something" (Tr. 1110). Finally, he claimed, he referred to "legal briefs" in the bill because he thought the case might develop into "a whole big thing" (Tr. 1111-12). As with each case Capanegro never returned any of the money when the litigation was not nearly as time consuming as at least he claimed he thought it would be.

The District Court concluded that the claimed services had not been rendered and rejected the contention that the bill was "a good faith estimate of services to be

* Capanegro testified that the incident occurred just a day before the bill. (Tr. 1106-7). Radloff's testimony, not Capanegro's, was credited by the District Court. (A. 12).

performed." (A. 12). It found that "Capanegro obtained payment of \$1,075 which he knew he was not entitled to." (A. 13).

Counts Six and Seven: Dolgin and Hevenor (Guilty)

Hal Dolgin and Duncan Hevenor were involved in a slight scuffle with another individual, Sterling Hostern, while on a picket line on January 10, 1972. Police who came to the scene advised the union members to make a formal complaint against Hostern as a means of protection in the event Hostern obtained a complaint against them. Acting on this recommendation, Dolgin and Hevenor secured a summons at the Long Island City courthouse against Hostern and brought the summons, which was returnable February 4, 1972, with them to union headquarters. (Tr. 475-78). Hevenor and Dolgin reported the incident to a union officer who took some notes, left a copy of the summons with the union officer and thereafter decided not to serve Hostern with the remaining copy but simply to drop the matter. Neither Hevenor nor Dolgin ever spoke with Capanegro about the matter. (Tr. 478-80, 484, 1117).

Capanegro obtained the union officer's notes of the interview (GX 600-C) and the copy of the Sterling Hostern summons which the union members had left at Local 1101 (GX 600-D) and opened a legal file. (GX 600). This constituted his total involvement in the case. (Tr. 1115-18, 1121-22).

Nevertheless, on January 13, 1972 Capanegro submitted a bill to Local 1101 which included the following two items totalling \$2,075.00 for Dolgin and Hevenor (GX 5):

"FOR PROFESSIONAL SERVICES RENDERED IN RE:

HAL DOLGIN

As and for all negotiations, conferences, appearances in Court in regard to criminal Charges in re the above; appearance in Court and attendance at trial:

\$1,075.00

FOR PROFESSIONAL SERVICES RENDERED IN RE:

As and for all negotiations, conferences, advice, appearances in Court in regard to Criminal Charges with DUNCAN HEVENOR:

1,000.00"

These monies were paid to Capanegro on February 11, 1972. As he did with many of the fictitious bills, Capanegro insisted that this was "a bill of what I anticipated to do in the future for them." (Tr. 1122). He could not recall what slight difference in the facts prompted him to set separate fees for Dolgin (\$1,075.00) and Hevenor (\$1,000). (Tr. 1121).^{*} He didn't try to call Hevenor or Dolgin because it was "for them to call me back to give me any future dates or anything of that nature" (Tr. 1121).

^{*} Nor could Capanegro explain the entry on his Hevenor-Dolgin legal file which he turned over to the U.S. Attorney's Office on February 26, 1975. The entry was as follows:

"Feb. 4 appear, Advised clients take out summons, call me any time advise, 2/20/72." (GX 600).

The entry was obviously false in view of the facts that Capanegro never spoke with Hevenor or Dolgin, the summons had been obtained by the union members on January 10th before they even reported the incident to the Local, nothing happened on February 4th because the Sterling Hostern summons was never in fact served, and all of this would certainly have been known by February 20, 1972 to anyone who actually followed up on the case. (Tr. 1118-20). Capanegro denied that this was an entry belatedly made by him after learning of the commencement of the Labor Department investigation. (Tr. 1118-19).

The District Court concluded that the claimed services had not been rendered and that the Hevenor and Dolgin items were separated in the bill solely to inflate the amount. The defense contention that these items were good faith estimates of contemplated services was rejected. (A. 14).

Count Eight: Giose Franco (Guilty)

Giose Franco testified that during the strike he was ordered by the police to come to the police station. He arrived at the police station with his father-in-law, who was a court officer, and was told by the police that they had made a mistake but that they did want to ask him certain questions while he was there. Franco didn't want to answer any questions and left. He was never placed under arrest and never ordered to appear in any court. (Tr. 552-54, 562). According to Franco, he never called, consulted with, or met Capanegro in connection with this or any other matter (Tr. 555, 563). He did recall mentioning the incident to his shop steward who told Franco that he would get back to Franco. Nothing ever happened after Franco's conversation with the shop steward. (Tr. 554, 558).

Capanegro testified that he first learned of the Franco matter on January 11, 1972 when he received a telephone message from his secretary stating: "Giose Franco, Local 1101; trouble with police. HM [Home] 653-2780. Picked up for questioning or harassment. They said he was the wrong guy." (Tr. 1126-28). Capanegro testified that this must have been a call to his office from Franco himself (Tr. 1126).^{*} The more likely explanation, and

^{*} Capanegro also believed that he "may" have spoken with Franco himself (Tr. 1118). He based this on a yellow piece of paper which comprised the entire contents of his Franco legal file. (GX 800-A). The following items appeared on the paper in Capanegro's own handwriting (GX 800-A; Tr. 1124-25):

[Footnote continued on following page]

the one accepted by Judge Griesa, was that either the shop steward or another union official had telephoned Capanegro about the incident. (A. 15).

On January 13, 1972, Capanegro submitted a bill to the union which included the following \$750.00 item for Giose Franco (GX 5):

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

GIOSE FRANCO

As and for all negotiations, conferences,
advice appearances in Court in regard to
Criminal charges with Giose Franco: 750.00"

The bill was paid on February 11, 1972 (GX 10B). Capanegro claimed that this item was "in futuro" (Tr. 1131).

The District Court found that essentially Capanegro had performed no services, and had "obtained payment of \$750 which he knew he was not entitled to". The District Court expressly rejected the notion that the bill was "a good faith estimate of services to be performed" (A. 15).

"Giose Franco, 653-2280, picked up and released, pushed and released, taken from home, advised client to swear out warrant against Telco. Advised of civil suit. Met with Ricky. Dec. 8. Told client no admissions. Would appear if trial; sue false arrest."

Capanegro denied that this was an entry belatedly made by himself after learning about the Labor Department investigation (Tr. 1125-26). The "Dec. 8" notation is inconsistent with an event which occurred more than one month later, on January 11th. The notations "pushed and released", "taken from home" are at odds with Franco's trial account of what actually happened. In addition, the allegedly simultaneous advice to make "no admissions" (normally given pre-arrest) and "sue false arrest" (normally given post-arrest) appear inconsistent.

Count Nine: Robert Zappulla (Not Guilty)

On January 7, 1972, Robert Zappulla became involved in an incident involving a telephone company truck on the way home from picket duty. Zappulla was notified to appear at the police station. Zappulla reported to the union office on January 10, 1972, and was given the telephone number of Capanegro, whom he called. In a brief conversation Zappulla told Capanegro where and when he was supposed to report and Capanegro told Zappulla to deny everything to the police and to call back if there were further developments. Some time later, Zappulla was taken by two detectives from his home to the precinct. He was released shortly thereafter, and there were no further proceedings. Other than the one telephone call from Zappulla to Capanegro, there was no further contact of any kind between Zappulla and Capanegro (Tr. 564-77).

On January 13, 1972 Capanegro submitted a bill including the following item which was paid on February 11, 1972 (GX 5):

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

ROBERT ZAPPULLA

As and for all negotiations, conferences
in regard thereto; arrest for misde-
meanor; Dismissal of same: \$500.00"

In acquitting the defendant on this Count, the District Judge stated: "I cannot find beyond a reasonable doubt that defendant either falsified this item or charged more than he thought he was entitled to." (A. 16-17).*

* Capanegro testified that sometime on January 10th before Zappulla's scheduled 2:30 p.m. appearance at the police station, he (Capanegro) made many phone calls to the police station and negotiated for Zappulla's release. (A. 16; Tr. 1136-37).

Count Ten: John Hyland (Guilty)

On January 10, 1972 John Hyland was brushed by a telephone company truck while on picket duty. Hyland telephoned Carnivale who had Capanegro call Hyland. Capanegro advised Hyland to fill out a complaint at the police station, which Hyland proceeded to do, giving the police the license number of the telephone company truck. Hyland's only further contact with Capanegro concerning the matter was one five minute chat at a union party at the Playboy Club and possibly one meeting at Capanegro's office. Nothing ever came of the case. (Tr. 580-86, 596-604, 1141-48; GX 1001).

Capanegro submitted a bill to Local 1101 dated January 14, 1972 which was paid (GX 5):

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

JOHN HYLAND

As and for all negotiations, conferences
and advice in regard to Criminal Charges
involving JOHN HYLAND; appearances at
hearing dates; Appearances at trial and
adjourned dates:

950.00"

Once again Capanegro claimed that this bill was an "in futuro" projection of the work he intended to do. He claimed that he was thwarted because no matter what he did he was unable to obtain the name of the man who drove the company truck that hit Hyland. (Tr. 1143, 1145-48). This testimony was false because the Telephone Company had furnished the driver's name to the police department and the name was included in the supplemental police complaint report which was a public record. (Tr. 1046-47; GX 1002).

The District Court found that the claimed services had largely not been rendered, rejected the assertion that

the bill was "a good faith estimate of services to be performed", and concluded that Capanegro had obtained payment of \$950.00 which he knew he was not entitled to. (A. 17-18).

Count Eleven: Joseph Cassidy (Guilty)

On January 14, 1972 union members Joseph Cassidy and Jacob Adler were arrested in connection with strike related activities, charged with disorderly conduct (a violation), represented in court at arraignment by a Legal Aid attorney and told to return to court on January 26th. The following day, Cassidy obtained Capanegro's name and address from the union and met with Capanegro at his office. Capanegro told Cassidy to find whatever witnesses were available and have them appear in court on January 26th. (Tr. 302-12).

On January 26th Capanegro waited for about one hour with the union members to go before the judge. During this time, Cassidy called the union about possible witnesses but no one appeared. When the Cassidy-Adler case was called, the judge granted ACD's as to both defendants and the case was closed. (Tr. 312-24; GXs 1101-06, 3901-02).

Five days later, on January 31, 1972, Capanegro submitted a bill to the union which included the following two non-adjoining items which were paid three weeks later (GXs 6, 10B):

"FOR PROFESSIONAL SERVICES RENDERED

IN RE: JOSEPH CASSIDY

As and for all negotiations conferences,
appearances in Court; preparation for
Trial; appearance on trial dates and
adjourned dates; trial of case:

1,375.00"

* * *

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: JACOB ADLER

As and for all negotiations, conferences
appearances in Court; preparation for
Trial; appearances on Trial Dates; and
adjourned dates:

1,325.00"

Capanegro explained that his January 31st bill (five days after the ACD's) contained several items, most of which were "in futuro"; in some instances he was billing for services to be rendered and sometimes for services in the past. Here, he explained, phrasing the item "in futuro" was simply inadvertent. As for the reference in the Cassidy bill to "trial of case", Capanegro claimed that was simply his "semantics" because when you went to a trial part in state court you had to be ready for trial and appearing in a trial part was therefore the equivalent of being "on trial." (Tr. 1149-52, 1159-60, 1389-90). Capanegro further contended that the two separate items for Cassidy and Adler on the bill were justified because there were two separate defendants in the case. He couldn't recall what the slight difference was in the cases which required the difference in fees for the two. The Cassidy and Adler items were separated (that is, non-adjointing) on his bill, he explained, because he had two separate legal files for them. (Tr. 1153-55).*

In convicting on this Count, the District Court found:

"This is a situation in which Capanegro made
a court appearance and achieved a successful dis-

* Capanegro's legal file on Cassidy (GX 1100) contained a single piece of paper with four lines of notes (GX 1100-A). His legal file on Adler (GX 3900) contained two pieces of paper with a total of six lines of notes. (GXs 3900-A, 3900-B).

position of a criminal case against union members. Nevertheless, I find that the description of services in the Cassidy item was intentionally exaggerated, by referring to multiple court appearances and an actual trial. Also the treatment of the Cassidy and Adler cases as two separate items was a device to inflate fees. I find that, by means of the bill in the Cassidy matter Capanegro knowingly obtained payment beyond what he was entitled to." (A. 18-20).

Count Twelve: John Toomey (Guilty)

On January 19, 1972 John Toomey removed the telephone discs from several pay phones. Toomey was arrested, charged with four misdemeanors and was represented by a Legal Aid attorney at his arraignment. He was instructed to return to court on January 26th.

Prior to January 26 Toomey obtained Capanegro's name from the union and conferred with Capanegro at his office for 30 to 45 minutes. During the conference, Capanegro recommended and he agreed to plead guilty. (Tr. 449-59).

Capanegro met Toomey in court on January 26, 1972 (the same morning on which Capanegro appeared with Cassidy and Adler),* and spent a total of 30 to 45 minutes with Toomey during which time Capanegro spoke with an Assistant District Attorney. Toomey thereupon pled guilty to disorderly conduct (a violation) and paid \$12.00 restitution for the telephone dials. When they left the courtroom, Toomey asked Capanegro how much he owed him and Capanegro responded that the union would take care of the fee. Toomey never heard from Capanegro again. (Tr. 459-65; GXs 1201-07).

* See "Count Eleven", pp. 29-30, *supra*.

Five days later, Capanegro submitted a bill containing the following \$5,400.00 item for John Toomey which was paid. (GX 6):

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

JOHN TOOMEY

As and for all negotiations, conferences, appearance in Court; preparation for trial on four Criminal Charges (misdemeanors) to wit: Criminal Possession of stolen property; Criminal tampering; Criminal Mischief and Larceny; appearances on Trial dates and adjourned dates; trial of case: 5,400.00"

Capanegro testified that his fee was \$5,400.00 in this case because Toomey had been charged with *four* misdemeanors. As to why he referred in the bill to multiple court appearances and "trial of case" five days after the disposition by guilty plea, Capanegro offered the same lame explanations as he had with the Cassidy and Adler items (Ct. 11) (Tr. 1160-81).

The District Court found that the description of the services and the amount of the bill were grossly exaggerated and that Capanegro had intentionally misdescribed the services in order to obtain a fee which he knew he was not entitled to. (A. 22).

Count Thirteen: Anthony Califra (Not Guilty)

Anthony Califra and Anthony Fasano were arrested on January 19, 1972 and charged with disorderly conduct in connection with a strike related incident. They were instructed to return to court on February 7th. They made an appointment to see Capanegro at his office on February 4th. (Tr. 650-54, 658-59).

On January 31, 1972, prior to any meeting with Califra or Fasano, Capanegro submitted a bill to Local 1101 which contained the following item for Califra (GX 6):

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

ANTHONY CALIFRA

As and for all negotiations, conferences,
appearances in Court; preparation for
Trial; appearances on Trial dates and
adjourned dates; trial of case: 1,550.00"

On February 4, 1972, Capanegro met at his office with Fasano * and possibly with Califra as well. On February 7, 1972 Capanegro appeared in court with both union members and after a brief appearance before the judge the case against both defendants was dismissed. (Tr. 654-58, 662-63, 1185-95).

Noting that Capanegro had advanced the theory that certain bills were good faith estimates of services to be performed, the District Judge wrote: "Giving Capanegro the benefit of every reasonable doubt, I find that the Government has not proved beyond such a reasonable doubt that the Califra item was not a good faith estimate of the kind Capanegro describes." (A. 23).

Count Fourteen: Michael Block (Not Guilty)

On January 20, 1972 Michael Block was arrested and charged with criminal mischief in the third degree, a misdemeanor, for letting the air out of a tire of a telephone company truck. He was released from the precinct after being given a desk appearance ticket instructing him to report to court on January 27th. A shop steward

* Capanegro also submitted a \$1,675.00 bill for Anthony Fasano. Both bills were paid on February 24, 1972 (Tr. 1194-95 A. 98).

referred Block to Capanegro and on January 22nd Block met with Capanegro in his office at which time Capanegro gave Block an affidavit requesting that the January 27th court proceeding be adjourned. Block presented the affidavit on January 27th, the case was adjourned, and Block advised Capanegro's office of the new scheduled date. (Tr. 503-07).

On January 31, 1972, Capanegro submitted a bill to the union which included the following item for Block which was paid on February 24, 1972 (GX 6):

"FOR PROFESSIONAL SERVICES RENDERED:
MICHAEL BLOCK

As and for all negotiations, conferences,
appearances in Court; preparation for
trial; appearances on Trial dates and
adjourned dates; trial of case: (Crim-
inal Mischief, 1st degree: 1,725.00"

Following a second adjournment and possibly a second conference with Capanegro, the matter was finally set down for March 24, 1972. At that time, the complainant from the Telephone Company failed to appear and the case was dismissed. (Tr. 507-09, 1198-1202, 1208-16).

In acquitting on this Count, the District Judge wrote:

"My remarks in connection with Count 13 apply here. I cannot find beyond a reasonable doubt that the Block item was not a good faith estimate of services to be performed." (A. 24).

Counts Fifteen-Seventeen: Neri, Wallen & Dzubay (Guilty)

On January 12, 1972, Robert Neri, Theodore Wallen, and Steven Dzubay were arrested together on disorderly conduct charges and given desk appearance tickets at the police station instructing them to appear in court on Jan-

uary 17th. The president of another local advised Neri and Wallen, who were not members of Local 1101, to bring witnesses with them to the scheduled court appearance.

On January 17, 1972, Neri, Wallen and Dzubay appeared with three witnesses in the court in Manhattan. Capanegro, apparently as the result of discussions between Locals 1101 and 1102 appeared in court to represent them. None of the three had ever spoken with or met Capanegro prior to the court appearance. Capanegro interviewed the union members and their witnesses and on second call the Assistant District Attorney agreed to have the case dismissed and the judge granted ACD's. Neither Neri, Wallen or Dzubay ever had any contact with Capanegro again. (Tr. 236-53, 260-66, 268-77).

Two weeks later, on January 31, 1972, Capanegro submitted a bill containing the following three items totaling \$5,700.00 which was paid on February 24, 1972 (GXs 6, 10B):

"FOR PROFESSIONAL SERVICES RENDERED IN RE:

ROBERT NERI

As and for all negotiations conferences, advice, appearances in Court in regard to Criminal charges; preparation of trial; appearances on Trial dates and adjourned dates; dismissal of same:

1,850.00

"FOR PROFESSIONAL SERVICES RENDERED IN RE:

THEODORE WALLEN

As and for all negotiations, conferences; preparation for trial; appearances on trial dates; & adjourned dates; dismissal of same:

2,000.00

"FOR PROFESSIONAL SERVICES RENDERED IN RE:

STEVEN DZUDAY

As and for all negotiations, conferences; advice; appearances in Court in regard to Criminal charges; preparation of trial; appearances on Trial dates; and adjourned dates; dismissal of same:

\$1,850.00"

Capanegro acknowledged that these bills, referring to "dismissal of same", were not "in futuro" bills. He said that the reference to "appearances in court" was his "art form" in phrasing the bills and conceded that he should not have added the "s" (Tr. 1223-24). He didn't know why he charged \$150,000 more for Wallen than for the others except possibly that he might have seen "more problems . . . in his kind of testimony that he would be giving for his fact situation" (Tr. 1223). When pressed by the Court to explain his bill, Capanegro said that he billed for each separate defendant up to \$2,000.00 for misdemeanors and violations and in deciding whether to bill \$500.00 or \$2,000.00 in a particular situation he took into account the difficulty of the case, the amount of anticipated work, the result obtained and his expertise. (Tr. 1227-35).

The District Court, after noting that Capanegro had billed separately for the three individuals although there "was basically only one case", found that "the separate itemization and the description of services was intentionally calculated to collect a grossly exaggerated total fee of \$5,700, which Capanegro knew he was not entitled to." (A. 27).

Count Eighteen: Peter O'Neal (Not Guilty)

On February 2, 1972, while in court with brother Local 1106 member Bruce Whyte,* Peter O'Neal was arrested for his participation in a January 27th strike related incident and charged with harassment. (Tr. 608-11).

On February 17, 1972, Capanegro submitted a bill to Local 1101 which included the following item (GX 7):

"FOR PROFESSIONAL SERVICES RENDERED IN RE:

PETER O'NEAL

As and for all negotiations, conferences, appearances in Court, preparation for trial appearances on adjourned dates; trial of case: \$1,450.00"

* The Government also introduced evidence pertaining to Capanegro's billings for Whyte. This evidence contradicted Capanegro's contention on direct examination (Tr. 781-83) and on appeal (Br. 12) that he never sent a second bill in a case at a later date. Whyte had been arrested on January 12, 1972 and his non-jury trial on three misdemeanor charges was held on February 2nd. Capanegro represented Whyte apparently as a result of some agreement between Carnivale and the president of Local 1106. Capanegro submitted two bills for Whyte totaling \$7,400.00. On January 13th he billed \$3,900.00 for Whyte as follows (GX 5; A. 95):

"As and for all negotiations, conferences; appearances for the above [Whyte] in night court; appearances in court and adjourned dates; appearances on trial; interviewing of witnesses; preparation for trial for three misdemeanors; inciting a riot; criminal mischief; disorderly conduct."

On January 31st, Capanegro billed another \$3,500.00 for Whyte as follows (GX 6; A. 97):

"Balance remaining for defense of two felonies; picking a jury; trying case, attendance at trial; preparation of trial briefs."

The two bills were paid on February 11th and February 24th, respectively. (Tr. 895-910, 919-21; GXs 3801-10, 3890).

O'Neal's case was adjourned on February 23, 1972 when he submitted an affidavit for adjournment obtained from Capanegro's office. On March 13, 1972 Capanegro made his single court appearance with O'Neal and O'Neal was granted an ACD. (Tr. 611-14, 1236-43).

In acquitting on this Count, the District Court referred to its remarks in connection with Count 13 and held that it could not find "beyond a reasonable doubt that the O'Neal item was not a good faith estimate of services to be performed." (A. 28).

Count Nineteen: Robert Pomposello (Not Guilty)

Robert Pomposello was arrested on January 23, 1972 and charged with misdemeanor assault for his participation in a fight on January 18, 1972. He was given a desk appearance ticket requiring him to be in court on February 2nd.

At Local 1101, Larry Lanaro gave Pomposello Capanegro's name and telephone number and told him the union would pay for his legal representation.* Pomposello conferred with Capanegro at his office and on February 2, 1972 obtained an adjournment of his case to March 8th by presenting an adjournment affidavit to the court which he had obtained from Capanegro.**

On February 17, 1972, Capanegro submitted a bill to Local 1101 which contained the following item (GX 7):

* This was the same Larry Lanaro Capanegro gave \$5,000 to when the amounts of his billings became public; Capanegro claimed this was a loan although through 1975 Capanegro had never sought or obtained repayment. See, *supra*, p. 10.

** As with all the affidavit for adjournment furnished by Capanegro to union members for presentation to courts, Capanegro described himself therein as Chief Counsel to Local

[Footnote continued on following page]

**"FOR PROFESSIONAL SERVICES RENDERED
IN RE:**

PEOPLE V. ROBERT POMPOSELLO

As and for all negotiations, conferences,
appearances in Court; appearances on
adjourned dates; preparation for trial;
Conferences with witnesses for trial of
case: (Assault in the 3rd degree) 1,850.00"

Pomposello and Capanegro appeared in court on March 8, 1972, and, against Capanegro's advice, Pomposello pled guilty to a reduced charge of harassment and was given a conditional discharge. (Tr. 279-300, 1243-52).

In acquitting on this Count, the District Court again referred to its remarks concerning Count 13 and held that it could not find "beyond a reasonable doubt that the Pomposello item was not a good faith estimate of services to be performed". (A. 29).

Count Twenty: Walter Jaszczuk (Not Guilty)

Shortly before the conclusion of the strike, Walter Jaszczuk was called by the police for questioning concerning a strike-related criminal matter. Jaszczuk went to the police station, was questioned, and nothing else ever came of the matter. Jaszczuk was given Capanegro's phone number by the union. Jaszczuk testified that prior to and after his trip to the police station he spoke with Capanegro's secretary (but not Capanegro himself) on the telephone. Capanegro testified, however, that he spoke with Jaszczuk directly on the telephone. (Tr. 493-502, 1252-57).

1101. In this affidavit, Capanegro swore that he had "been on trial every day for the past six weeks and will be so engaged for the next three weeks." (A. 160; GXs 1908, 1900-B). The statement was clearly false. Indeed, for a portion of the time he had been in Switzerland on vacation. (Tr. 1246). See p. 16, *supra*.

Capanegro's February 17, 1972 bill to the union contained the following \$250.00 item for Jaszczuk which was paid on February 29, 1972 (GX 7):

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

PEOPLE V. WALTER JASZCZUK

As and for all negotiations, conferences,
counselling, and advice in regard to pending
charges which may be lodged against
him: 250.00"*

In acquitting Capanegro on this \$250.00 item, the District Court noted that it could not find "beyond a reasonable doubt that Capanegro billed more than he thought he was entitled to." (A. 30).

Count Twenty-One: Warren Lopez (Guilty)

Toward the end of the strike Juan Lopez was involved in a scuffle with a foreman. Hearing that a complaint might be filed against him, Lopez checked at the police station. No complaint had been filed and he went home. Thereafter he obtained Capanegro's telephone number from the union and called Capanegro. During their brief conversation, Capanegro advised Lopez to have

* The Government contrasted the wording of this bill ("charges which *may* be lodged") with the past tense descriptions used by Capanegro in several of the other bills which the defense claimed at trial were merely "in futuro" good faith estimates of work which Capanegro contemplated performing in the future. Capanegro also testified that he thought the Jaszczuk matter involved possible "homicidal assault" charges and that in his view the case was worth \$250.00. The relatively accurate wording of this bill and the \$250.00 value which Capanegro attached to the matter, the Government argued, cast considerable doubt on the good faith nature of Capanegro's other alleged "in futuro" estimates. (Tr. 1254-55, 1418-20).

his wife answer the door if the police came or otherwise avoid arrest, if necessary, by climbing down the fire escape, and to call back if, indeed, he was arrested. Lopez never met Capanegro and they never spoke or corresponded after this single conversation. (Tr. 440-48, 1257-60).

Capanegro's February 17, 1972 bill (paid on February 29th) included the following \$750 item for Lopez (GX 7):

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

PEOPLE V. WARREN LOPEZ

As and for all negotiations, conferences,
advice, appearances in Court in regard
to Criminal charges: 750.00"

Capanegro claimed that this bill was for what he expected to do for Lopez in the future if called upon. (Tr. 1260).

In convicting on this Count, the District Court concluded that this item was submitted by Capanegro with the knowledge that it "was almost entirely a statement of services which had not been rendered" and rejected the contention that it was a good faith estimate of services to be performed. (A. 31).

Count Twenty-Two: Michael Antonucci (Guilty)

On January 23, 1972 Michael Antonucci was involved in a knife fight incident totally unrelated to the strike. Local Treasurer James Fitzgerald learned that a warrant was outstanding against Antonucci for stabbing his neighbor and so informed Capanegro.

At some point Capanegro spoke to Antonucci at the union office but shortly thereafter Antonucci advised

Capanegro that he had his own attorney, Robert Schwartz, Esq. Capanegro never communicated with Schwartz. Schwartz represented Antonucci on the felony charges which were eventually dismissed in April. Schwartz charged Antonucci \$750 and never billed the union. (Tr. 485-92, 530-33, 1261-74, 1349-51).

Capanegro's February 17, 1972 bill (paid on February 29th) included the following \$875 item for Antonucci (GX 7):

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

PEOPLE V. MICHAEL ANTONUCCI

As and for all negotiations, conferences,
advice, appearances in Court in regard
to Criminal Charges:

875.00"

Capanegro testified that this February 17th item was an "in futuro" bill and that he thought he would be representing Antonucci when he sent the bill. As with all the bills he never returned any part of the fee. Thereafter, according to Capanegro, Antonucci grew disenchanted with president Ricky Carnivale and didn't want to be represented by Capanegro who was "Carnivale's confidant." (Tr. 1266). Capanegro admitted, however, that he didn't appear with Antonucci on February 6th (11 days before the bill) when Antonucci surrendered to the police and was arraigned, or on February 8th (9 days before the bill) when Antonucci again appeared in court. (Tr. 1267-68; GXs 2204, 2209, 2210, 2211).

In convicting on this Count, the District Court found that Capanegro performed no services in the case and that this item was not a good faith estimate of services to be performed. (A. 32).

Count Twenty-Three: Jack Russek (Guilty)

On January 25, 1972 Jack Russek was brushed by a telephone company truck driven by one Roger Kurz. Russek promptly reported the incident at the local precinct, leaving personal information so that he could be contacted by the District Attorney's office when Kurz was arrested. (Tr. 216-17; GXs 2305-07).

Kurz was arrested on February 8, 1972 and within a few days Russek received notice from the police requesting him to appear in a Manhattan court as a witness on March 3rd. Russek obtained Capanegro's telephone number from the union and on February 15, 1972, called Capanegro's office, advising of the March 3, 1972 date. Russek spoke with Capanegro only once on the telephone and had no further contact of any type with him. During the phone conversation, Capanegro told Russek that the District Attorney would handle the case. (Tr. 220-32, 1276).

Capanegro's February 17, 1972 bill (paid on February 29, 1972) included the following \$675 item for Russek (GX 7):

"FOR PROFESSIONAL SERVICES RENDERED
IN RE:

JACK RUSSEK

As and for Conferences, Negotiations
and Appearances at Hearing, Appearance
at arraignment for charges involving
Jack Russek; legal advice in regard
thereto

675.00"

On March 3, 1972 at 9:30, Russek appeared in court without Capanegro. After speaking with the prosecutor, Russek dropped the charges against Kurz and the case was dismissed. (Tr. 216-32, 1274-84).

Capanegro testified that he first learned about the Russek matter on February 15th.* To support his contention that the February 17th bill contained a good faith description of work he actually expected to do, Capanegro pointed to an entry in his diary for March 3rd: "Stop in re Russek, talk to DA, 9AM" (GX 2350) and claimed that he appeared in court in Manhattan at 9:00 a.m. on March 3, 1972, spoke with the Assistant District Attorney about Russek's case and left before Russek himself appeared.**

In convicting Capanegro on this Count, the District Court specifically rejected the claim that the description of services in the Russek bill was "a good faith estimate of services to be performed." (A. 34).

* Capanegro's legal file for Russek (GX 2300) contained a yellow piece of paper (GX 2300-B) with the following notation in Capanegro's handwriting:

"Feb 28, home 863-6205

Spoke to Jack Russek, struck by Telco trk, slightly injured, Told him make complaint against driver, Sent 100 Centre St., advised rights and suit, Diary March 3, return of warrant, Told client will appear if trial"

The notation was illogical. By the time the March 3rd court date was set (after Kurz's February 8th arrest), Russek had already filed a complaint at the precinct. When asked about this notation on cross-examination, Capanegro conceded that the entry may not have been made contemporaneously and that after the union's civil suit against him began he made notes in some of his legal files to "refresh [his] recollection." (Tr. 1275).

** The entry, unlike most in Capanegro's diary, appeared in Capanegro's own handwriting. It appeared above an erasure. The diary contained entries on the same date for 9:30 a.m. in the Dino Conti case, a federal hijacking case in the Eastern District of New York, and an 11:00 a.m. appointment back in Manhattan. (Tr. 1202-06, 1280-83). Accordingly, the Government argued that the March 3rd entry for Russek was faked. (Tr. 1277-84, 1429-34).

Count Twenty-Four: Joseph McAleer (Guilty)

On January 31, 1972, Joseph McAleer, a vice-president of Local 1101, was involved in a fight on a picket line. That night, at a union meeting, McAleer advised Capanegro that he expected to be arrested. (Tr. 677-78).

The following day, February 1st, McAleer was arrested and charged with felonious assault in the second degree and harassment. (GX 2401). He appeared in court without an attorney, posted \$500 bail, and was released after being told to report back to Court on March 13, 1972. On February 3rd, at the union office, McAleer discussed the case with Capanegro who took three pages of notes. (GX 2400-J). Capanegro looked up felonious assault in a book and told McAleer that he could get seven years and that the situation was serious. (Tr. 666-69).

Subsequent to this meeting, McAleer decided he did not want to use Capanegro. He went to the firm of Friedman & Friedman which requested a \$1,000 retainer to represent him. On February 15th, an indictment was filed against McAleer charging him with two felonies (assault in the first degree and assault in the second degree) and one misdemeanor (possession of a dangerous weapon). (Tr. 669-71).

On February 17, 1972 Capanegro submitted a bill containing the following \$4,500 item for McAleer (GX 7):

"FOR PROFESSIONAL SERVICES RENDERED IN RE:

JOSEPH MCALEER

As and for all negotiations, conferences, appearances in Court; preparation for trial; conference with witnesses and with client; appearances on trial dates and adjourned dates; trial of case; (Felony and Misdemeanor) \$4,500.00"

On February 22, 1972, after telling Carnivale that he did not want to be represented by Capanegro, McAleer obtained \$1,000 from the union for Friedman & Friedman. (GX 2451). On February 29, 1972, Capanegro received \$4,500 from Carnivale on his bill for McAleer. (GX 10B).

Capanegro's legal file contained the original copy of an affidavit requesting an adjournment in the McAleer case on the originally set March 13th court date. (GX 2400-F). Since the indictment had been filed this court date no longer existed. Capanegro admitted that after February 3rd he never spoke with McAleer about the case, but insisted that through March 13th he was unaware that McAleer had obtained new counsel and no longer wanted his services.

McAleer, from the time of his indictment, through its dismissal in late August 1972, was at all times represented by Richard Friedman, Esq. (GX 2402). Friedman's firm transcribed interviews of a half-dozen witnesses (GX 2453) and had a background check performed on the complainant. In March, 1972 it filed a motion seeking to dismiss the indictment on the ground that McAleer had not been offered the opportunity to appear before the indicting grand jury. Friedman spoke with Capanegro on the telephone in March in connection with that motion to make certain that Capanegro had not received any notice from the District Attorney's office offering McAleer the opportunity to appear before the grand jury (Tr. 665-91, 701-21, 1285-1312).

On April 24, 1972, Capanegro forwarded a "Resume" of the facts of the McAleer Case to the CWA's lawyers in connection with the forthcoming arbitrations. (GX 2400-E). (See p. 9, *supra*). In the "Resume", Capan-

egro attempted to conceal his non-role in the McAleer case.*

One month after the McAleer indictment was dismissed, on September 20, 1972, Friedman submitted a bill for an additional \$1,500 through McAleer to the union (GX 2400-A; Tr. 1285). The bill was forwarded by Carnivale to Capanegro.** On October 12, 1972, Capanegro sent a letter to Friedman advising Friedman that he was prepared to pay the September 20th bill to Friedman "as co-counsel" but that he first wanted Friedman to send him copies of the motions, decisions and legal documents. (GX 2400-C; Tr. 1298-99). By this time, McAleer had seen the campaign literature containing copies of Capanegro's legal bills. This was the first time he had become aware of the Capanegro bill and he di-

* In the "Resume", Capanegro incorrectly reported that the incident involving McAleer took place on February 3, 1972. He wrote that he had no copies of the complaint or indictment but reported that McAleer had been charged only with assault in the second degree. Finally, he wrote "Mr. McAleer wanted his own attorney from the Bronx. His name is Richard Friedman ... and he is handling all the procedural aspects to trial." There was no suggestion, however, that Capanegro was himself out of the case or that he would not be trying it. (GX 2400-E; Tr. 1286, 1289-92, 1295).

** Capanegro's legal file contained the original copy of Friedman's September 20, 1972 \$1,500 bill addressed to Carnivale. (GX 2400-A). It also contained the original of a letter Capanegro claimed to have sent to Carnivale, dated September 22, 1972, after the Friedman bill was forwarded to him. (Tr. 688-89). Capanegro stated in the letter (falsely) that he conferred with McAleer in March, 1972; that he did "a lot of preparatory work"; that he had numerous telephone conversations with Friedman and that he had told Friedman that fees would be worked out between them after the case was over. He also stated in the letter that he had not heard from McAleer or Friedman since April 1972. He in fact, of course, had not heard from McAleer since February 3, 1972. (GX 2400-B; Tr. 715, 1294-96, 1211).

rected Friedman not to send Capanegro copies of any of the legal papers. (Tr. 673-76).

On February 5, 1973, Capanegro finally sent Friedman a check for \$1,500 (GX 2450) together with another letter requesting copies of the "legal work which you have rendered." (GX 2400-D; Tr. 1286).

In convicting on this Count, the District Court observed that "Capanegro was corresponding with Friedman in a contrived effort to act as 'co-counsel' for the purpose of justifying Capanegro's undeserved fee of \$4,500." (A. 35). The Court concluded that "Capanegro knowingly billed for services he had not performed. This was not the case of a good faith estimate of services to be performed. At the very least, Capanegro should have refunded the \$4,500 to Local 1101 when he learned that Friedman was in the case, which was no later than mid-March. Capanegro's payment of \$1,500 to Friedman still left Capanegro with \$3,000 which he knew he was not entitled to." (A. 36).

ARGUMENT

POINT I

The Evidence Established that Capanegro Was Employed by Local 1101 Within the Meaning of 29 U.S.C. § 501(c).

As if in fulfillment of Judge Friendly's prophecy that "the construction of 29 U.S.C. § 501(c) is an issue that will be with us for a long time . . .," * the primary question raised on this appeal is whether Judge Griesa erred

* *United States v. Silverman*, 430 F.2d 106, 126 (2d Cir. 1970), modified *per curiam* on other grounds, 439 F.2d 1198, cert. denied, 402 U.S. 953 (1971).

in finding that Capanegro's activities as Local 1101's Chief Counsel, presidential confidant and retained-attorney brought him within the ambit of the embezzlement section of the Labor-Management Reporting and Disclosure Act ("LMRDA"). That section, codified at 29 U.S.C. § 501(c), prescribes criminal sanctions for

"[a]ny person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, . . ."
(Emphasis supplied.)

Prior to trial Capanegro moved to dismiss the indictment on the ground that the statute was inapplicable to him because he was not an officer of the union and, as an attorney, could not be considered a union employee. Judge Griesa denied the dismissal motion with leave to renew at trial, finding that Capanegro's association with Local 1101 was sufficient to bring him within the purview of the statute. (Tr. of Feb. 24, 1977 Pretrial Conference, pp. 4, 13-14; A. 44, 53-54). At the conclusion of trial, Judge Griesa, on the basis of the extensive evidence which had been introduced concerning Capanegro's relationship with the union and its officials, reaffirmed his finding that Capanegro was "employed" by Local 1101. (A. 5, 36). That conclusion was clearly correct.

Capanegro in the literal language of the statute "embezzle[d] or convert[ed] to his own use . . . moneys . . . of a labor organization . . . by which he (was) employed." We detail below the facts which compel the conclusion that Capanegro was employed by the union. Capanegro rejects this conclusion only through a distorted and unnecessarily narrow interpretation of the literal language of Section 501(c). The statutory interpretation advanced

by the defendant is inconsistent with the language, legislative history and the basic purposes of the statute.

Capanegro was more than an attorney occasionally employed by the union. Rather, from April 1971 through December 1972, Capanegro served as Chief Counsel to the local pursuant to a formal written contract requiring him to handle all union legal affairs for \$25,000 a year. (GXs 12, 13; A. 102-05). During the 4½ months in which Capanegro received \$113,025 above his retainer for representing union members with legal difficulties stemming from the strike, no other attorney except one received any money from the local's defense fund for representing arrested strikers.*

With respect to his legal fees in strike related cases Capanegro looked solely to the union for payment. During the strike, he turned away inquiries about payment from individuals such as John Toomey (Ct. 12) with assurances that the union would pay. (Tr. 462). Copies of his bills were never sent to his supposed "clients". Indeed, he never met or spoke with some of these "clients".** Capanegro admitted on cross-examination that he never intended to seek payment from an individual member and where the union would not pay he would withdraw his representation. (Tr. 926-30).

* The one exception is Richard Friedman who received \$1,000 under the unusual circumstances of the McAleer case. See Count 24, *supra*, pp. 45-48. Contrary to defendant's suggestion (Br. 6), Capanegro was the *only* attorney—not merely one of several—to whom the union hierarchy referred members during the seven-month strike.

** Capanegro would certainly be hard pressed to explain who employed him—if not the union—in those instances where he submitted bills for individuals he had never met or spoken with. (E.g., Dolgin, Hevenor, Franco—Cts. 6-8, *supra*, pp. 23-26).

In addition, when making appearances with arrested strikers, Capanegro repeatedly advised the courts that he had been retained by Local 1101. When filing notices of appearance in cases involving union members during the strike, Capanegro consistently wrote that he had been retained by the union, and not the individual union member. (GXs 1104, 1206, 1303, 1807, 1907, 3004, 3802, 4103, 4203, 4303; see, *e.g.*, A. 159). Similarly, in the only legal papers ever filed by Capanegro in connection with any of the cases for union members—affidavits for adjournments—Capanegro described himself as Chief Counsel to Local 1101. (GXs 400A, 1403, 1406, 1803, 1908, 2507, 2800-B1, 3309, 4000-Q, 4204; see, *e.g.*, A. 160).*

Capanegro's retainer with the union meant that he was directly employed by the union, and that retainer along with the responsibilities and power incident to being Chief Counsel provided Capanegro with the opportunity to embezzle the union's funds. Thus, his position as Chief Counsel to Local 1101 and his continual and exclusive representation of union members arrested for strike related activities constitute more than sufficient direct connection with the union to fall within the ambit of 29 U.S.C. § 501(c)—“embezzles . . . or converts to his own use . . . moneys . . . of a labor organization . . . by which he is employed, directly or indirectly.” However, other

* On cross-examination, Capanegro stated his understanding with respect to his representation of arrested union members:

“My understanding was that when I—when the union called me and said, ‘Mr. Capanegro, represent this man,’ and I got a call from headquarters, that was a retainer. Somebody in there was retaining me to represent someone. Whether it was strike-related or not, that is not my—it is not my concern. I got a call from the Union, 1101, and they say ‘There is a fellow involved in criminal charges, we are going to pay it.’ That was my understanding, that they would pay it. If they want me to defend their members, they can pay.” (Tr. 929).

aspects of Capanegro's relationship to the union make clear that he belongs to the precise category of individuals Congress intended to impose criminal sanctions upon if they looted the union treasury—"men who have risen to positions of power and responsibility within unions [and who] have abused their power and neglected their responsibilities." Senate Report No. 187, House Report No. 741, *reprinted in* 2 U.S. Code Cong. & Admin. News, 86th Cong., 1st Sess. 2322, 2428-29 (1959).

Capanegro was throughout the relevant period a close adviser and confidant of Local 1101 president, Ricky Carnivale.* As Chief Counsel he reviewed the bills of other attorneys ** and knew with respect to his own bills

* On the stand, Capanegro described himself as Carnivale's "confidant." (Tr. 1266).

** Evidence was introduced at trial concerning three separate situations where bills of other attorneys were referred to Capanegro:

(a) the \$200 bills of David Rubin, Esq. (marked 'Not To Be Paid') in the Gallo and Goodman case (which Capanegro subsequently billed \$6,000 for) were referred to Capanegro by Carnivale in October, 1971 (GXs 47A, 47B; A; 157-58; Tr. 522-25, 621-22, 635-37, 1333-35, 1338). See ; p. 7, n.** *supra*.

(b) Capanegro's files contained the original copy of Richard Friedman's September 20, 1972 bill to Local 1101 in the McAleer case (GX 2400-A; Tr. 1294). See Count Twenty-Four, pp. 45-48, *supra*.

(c) Shortly after becoming Local 1101 Chief Counsel, Capanegro negotiated a written contract with the law firm of Kaming & Cunningham for representation of strikers arrested during a January 1971, wildcat strike. (GX 46B; A. 143-46; Tr. 970-89). Joseph Kaming's September 27, 1971 letter (GX 46D; A. 148-49), requesting partial payment under the contract, was addressed directly to Capanegro. On November 11, 1972, Kaming sent another letter directly to Capanegro (GX 46F; A. 151-56), requesting payment of the balance of the fees which were long overdue to his firm. See p. 6, n. ***, *supra*.

at the time of payment, that the work which he claimed to have performed would not be reviewed or checked out by 1101 officers or others administering the Local 1101 Defense Fund. He knew (as he indicated in his letters to the United States Attorney's Office) that it would be "assumed that they were right and proper." (GXs 14A, 14B; A. 127; Tr. 970). See, *supra* p. 7, n. In effect Capanegro's roles as Chief Counsel for the union and a lawyer retained by the union to represent individual strikers merged. He became the sole approver of own bills—the sole check and balance upon himself.*

In addition to approving or rejecting bills submitted by other attorneys, Capanegro was involved with Local 1101 in many other significant ways. Even prior to the strike Capanegro attended and spoke at the union's general membership meetings. (Tr. 768-69, 932, 974). During the strike he attended mass demonstrations, giving a speech at such a demonstration at City Hall in November, 1971. (Tr. 1382). Capanegro claimed to have been constantly present at the union (Tr. 782, 924-25), and attended official union social gatherings. (Tr. 582, 1145).

Thus, Capanegro succeeded in his pilfering of union funds precisely because of the position of trust he held within the union. He was by title and authority a fiduciary to Local 1101 who manipulated his employment with the union to convert union funds to his own use.**

* The normal procedures and safeguards utilized by the union to pay members' bills during the strike were by-passed in the case of bills submitted by Capanegro. See, *supra* p. 7, n.**.

** Judge Griesa found that Capanegro occupied a position of trust with respect to Local 1101 and that he breached that trust. (A. 72; Tr., Sentencing, Sept. 27, 1977, p. 12). Although it is not an essential element of 29 U.S.C. § 501(c) that the defendant actually be serving as a fiduciary with respect to the union, it is certainly relevant that Capanegro's position with Local 1101

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The legislative history of the statute in question further demonstrates that Congress intended to cover persons in Capanegro's position. Indeed that history reveals that individuals with fewer connections to the union are covered under the statutory phrase—employed by the union.*

During the late 1950's corrupt union practices were the subject of extensive Congressional hearings and became the focus of national attention. To correct the abuses that had been uncovered, President Eisenhower, on January 23, 1958, sent a message to Congress in which he recommended a substantial expansion of the federal laws

as Chief Counsel and adviser and confidant to the President, clearly did impose a fiduciary or quasi-fiduciary duty upon him. See, e.g., *Doyle v. United States*, 318 F.2d 419, 423 (8th Cir. 1963); *United States v. Goad*, 490 F.2d 1158, 1162 n.5 (8th Cir.), cert. denied, 417 U.S. 945 (1974); *United States v. Sullivan*, 498 F.2d 146 (1st Cir.), cert. denied, 419 U.S. 993 (1971); *Colella v. United States*, 360 F.2d 792, 799 (1st Cir.), cert. denied, 385 U.S. 829 (1966). Cf. *United States v. Robinson*, 512 F.2d 491 (2d Cir.), cert. denied, 423 U.S. 853 (1975); *Aho v. Bintz*, 290 F. Supp. 577, 580 (D.Minn. 1968) (29 U.S.C. § 501(a) and (b)).

* The statute makes it a crime if a person "embezzles, steals . . . abstracts or converts . . . moneys . . . or a labor organization of which he is an officer, or by which he is employed, directly or indirectly." Capanegro contends that "directly or indirectly" modifies "embezzle, steal, abstracts or converts," and not "employed". That issue of statutory construction has never been decided. See, *infra*, p. 56, n.*. While we believe that as a matter of sound logic and good grammar "directly or indirectly" modifies "employed" this Court certainly need not reach that issue in this case because Capanegro as Chief Counsel was literally employed by Local 1101. We note, however, that the legislative history supports the view that "directly or indirectly" modifies employed, and the use of that phrase demonstrates a Congressional purpose to construe broadly the class of individuals covered by a statute designed to protect a union treasury from the precise type of looting engaged in by the defendant.

relating to labor organizations. 104 Cong. Rec. 817-18. In his Congressional message President Eisenhower urged the creation of a new federal criminal offense of embezzling union funds. 104 Cong. Rec. 818. To implement the President's labor proposals a bill, designated as S. 3097 and known as the Labor Reports Act, was introduced by Senator Smith of New Jersey on the same day that the President's message was sent to Congress. 104 Cong. Rec. 818-19. Section 501 of this bill provided that "[w]hover, being *engaged directly or indirectly . . .*" with union funds commits a federal crime by embezzling those funds. Senate Bill 3097, pp. 27-28, 85th Cong., 2d Sess. (1958).

To clarify for Congress the provisions of the administration's bill, the Department of Labor drafted an "Explanation of a Bill for the Enactment of the Labor Reports Act of 1958" which was, with the unanimous consent of the Senate, inserted into the Congressional Record on January 30, 1958. 104 Cong. Rec. 1326-27. This 1958 Labor Department report to Congress indisputably establishes that the words "directly or indirectly" as used in that bill were intended to modify the type of employment rather than the type of illegal taking. As stated in the report, the purpose of Section 501 was

" . . . to make it a felony for any person having any direct or indirect functions in connection with the money or other property of a labor organization subject to the provisions of the bill to embezzle, steal or unlawfully take or convert any of the assets of the organization." (104 Cong. Rec. 1237; emphasis supplied.)

Although the labor bill that passed both Houses of Congress in 1959 was a compromise measure and not President Eisenhower's original bill, the enacted bill did create a new federal crime of embezzling union funds. 29 U.S.C. § 501(c). The Labor Department report, quoted above, is the only legislative history we have found explicitly

addressing the question of whether Congress intended the newly-created crime of embezzlement of union funds to apply to those persons whose employment by a union is only indirect. See *Union States v. Ford*, 462 F.2d 199, 201 (7th Cir. 1972); S. Duker, *Syposium on LMRDA* 519, 526 (R. Slovendo, ed. 1961). If Congress intended to cover those with indirect connection to the union, it most surely intended to cover a local's Chief Counsel.*

Capanegro argues that the word "employed" is limited to individuals who have payroll and social security taxes withheld by the union and whose work for the union would fall within the ambit of workmen's compensation laws. (Br. 40). Such an interpretation is not in accord with the broad remedial purpose which the statute was designed to achieve and gives rise to irrational distinctions in coverage which the Congress could not truly have intended.**

*In support of his argument that "directly or indirectly" does not modify "employed" Capanegro cites five clearly distinguishable cases. (Br. 35). None of the cases relied upon by Capanegro involved a defendant whose relationship to the union as an officer or employee was even in issue. Hence, those cases did not decide—and did not purport to decide—whether "directly or indirectly" modifies "employed." In one of the cited cases, *United States v. Robinson*, 512 F.2d 491, 493 (2d Cir.), *cert. denied*, 423 U.S. 853 (1975), Judge Mulligan did write that "The statutory language condemns the embezzlement or conversion not only of moneys, funds and securities, but also of 'property, or other assets of a labor organization . . . directly or indirectly. . . ." However, the question of which term was modified by "directly or indirectly" was not present in *Robinson* and there is nothing in the facts or holding of the Court's opinion to suggest that the Court intended to decide the question of statutory construction raised here. Indeed, the *Robinson* opinion as a whole is contrary to Capanegro's position that the statute is only meant to cover those officials with access to the union treasury because the union officials convicted in *Robinson* had no such access.

**Capanegro's argument ignores a fundamental rule that words in a statute must be defined in the context of the goals and purpose of the statute. For example, the Supreme Court in

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Under this "payroll employee" interpretation a distinction would be drawn between a \$7,500 a year clerical employee on the union's payroll and a private attorney who receives \$100,000 * a year from a union for legal services. Embezzlement, theft or conversion of union monies or assets by the clerk presumably would be covered by the statute but the same conduct by the attorney would be exempt. With equal irrationality, the "payroll employee" interpretation would presumably distinguish as well between an "in-house" attorney for the union whose union salary was subject to withholding taxes and an attorney whose office was outside the union but who performed all of the union's legal work and whose income was almost exclusively derived from the union.** Congress surely did not intend such irrational distinctions.***

NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) established the following test for determining the meaning of "employee", as that word is used in 29 U.S.C. § 152:

"The word is not treated by Congress as a word of art having a definite meaning. Rather, it takes color from its surroundings [in] the statute where it appears . . . and derives meaning from the context of that statute, which must be read in the light of the mischief to be corrected and the end to be attained." *Id.* at 124. (Citations omitted).

Consequently courts have interpreted the word "employee" in varying circumstances to include non-wage earners and independent contractors. *See, e.g., United States v. Morris*, 39 U.S. (14 Pet.) 464, 475-76 (1840); *Stephens v. Cotton Producers Ass'n*, 117 F. Supp. 517, 523 (N.D. Ga. 1953); *Lutkevich v. Brennan*, 128 Conn. 651, 25 A.2d 66 (1951); *Kravis v. Hock*, 137 N.J.L. 252, 59 A.2d 657 (1948); *Antichi v. New York Indemnity Co.*, 126 Cal. App. 284, 14 P.2d 598 (1932).

* During the last four and half months of the strike Capanegro was paid \$113,025 by the union in addition to his \$25,000 a year retainer. (GX 10B).

** 76% of Capanegro's gross professional income during 1972 came from the union. *See, infra* p. 62, n.***.

*** Capanegro also argues that because the "special skills" of attorneys are "distinct from the skills of union officials and employees", attorneys should be exempt from the wrongful taking

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We have found no reported decisions discussing the applicability of Section 501(c) to attorneys.* Judge Griesa concluded that an independent contractor whose relationship to a union was as close as Capanegro's was to Local 1101 must be considered to fall within the scope of the statute. (Tr. of Feb. 24, 1977 Pretrial Conference, pp. 11-14; A. 44, 51-54). Judge Griesa's decision was clearly correct for it is inconceivable that Congress could have intended to exclude from the reach of Section 501(c) massive pilferings of union funds by retained attorneys who breach their most sacred trusts. In light of the compelling interest § 501(c) was designed to protect, and in view of this Court's admonition that the statute was designed to eliminate "gaps" and "crevices" which have permitted guilty men to escape punishment, the District Court's decision was correct. See *United States v. Silverman*, 430 F.2d 106, 126 (2d Cir. Cir. 1970), *modified per curiam on other grounds*. 439 F.2d 1198, *cert. denied*, 402 U.S. 953 (1971).

provisions of Section 501(c). There is nothing in the case law, legislative history or remedial purpose of the statute to justify such an exemption. Indeed, the statute itself clearly shows that when Congress intended to exempt people it knew how to and when it intended to make special provision for attorneys, it also knew how to. See 29 U.S.C. §§ 432(a) and 504 (excluding employees "performing exclusively clerical or custodial services") and § 434 (preserving the traditional attorney-client privilege in reports to be filed under the Act). Moreover attorneys clearly are not exempted from the coverage of somewhat analogous statutes, such as 18 U.S.C. § 657, which proscribe wrongful takings of monies from federal savings and loan associations. See, e.g., *United States v. Schmitt*, 52 F. Supp. 790 (D.Pa. 1943).

* Since the trial in this case an indictment charging an attorney with violations of Section 501(c) has been filed in the Southern District of Florida. *United States v. Gopman*, 77-470-Cr-JE (October 12, 1977). Pretrial motions raising the statutory construction question presented on this appeal are *sub judice* in *Gopman*.

POINT II

The District Court's Finding that Capanegro Wilfully Defrauded the Union Was Compelled by the Evidence. The Criteria Applied by the District Court To Reach that Conclusion Were Correct and Proper.

Capanegro contends that there was no evidentiary basis to justify the finding that he acted with fraudulent intent. This contention simply ignores the evidence, and the basic principle that in reviewing the sufficiency of evidence this Court must view the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Amrep Corp.*, 560 F.2d 539, 543 (2d Cir. 1977), *cert. denied*, U.S.L.W. (January 10, 1978). Capanegro seems to insist that the District Court was obligated to draw all inferences in his favor and to conclude that he acted in good faith.

Throughout the trial the factfinder—Judge Griesa—made clear that the Government had the substantial burden of proving beyond a reasonable doubt Capanegro's lack of good faith.* See *United States v. Lamont*, Dkt.

* Appellant's argument (Br., Point Five) that the District Court applied the civil doctrine of *quantum meruit* to convict him is simply wrong. The Government urged that the defendant should be acquitted if the Court concluded that the issue was simply one of reasonableness of legal fees. (Tr. of February 24, 1977 Pre-trial Conference, pp. 10-11; A. 50-51). Indeed the Government never sought to offer expert testimony as to what constituted a reasonable fee because the issue was one of criminal intent, and could not be decided upon the civil doctrine of *quantum meruit*. Throughout the trial, Judge Griesa defined the Government's burden as proving wilfulness and criminal intent and disproving good faith beyond a reasonable doubt. He further suggested that he would not convict on any count where the issue simply came down to what a reasonable or appropriate legal fee

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No. 77-1118 slip op. 6337, (2d Cir., October 28, 1977); *United States v. Hart*, 417 F. Supp. 1314, 1322 (D.C. Iowa, 1976). The District Court was correct in concluding with respect to seventeen of the counts that the Government had met that burden. In the circumstances of this case where an attorney submitted bills containing *false* descriptions of services rendered, where the only apparent rationality for the setting of specific fees was to deceive auditors as to the true basis of such fees, and where the attorney thereafter falsely attributes authorship of the bills to his secretary and fabricates evidence to suggest the performance of services which he did not actually perform, the District Judge is fully justified in finding the requisite fraudulent intent. Cf. *United States v. Chestnut*, 533 F.2d 40, 48-49 (2d Cir. 1976).

It was impossible for Capanegro's defense to deal successfully with his consistent false descriptions of legal services. After noting that he had considered the evidence pertaining to all 54 bills (as opposed to only the 24 in the Indictment), Judge Griesa observed that this was not simply a case of "four out of 54" where the language was inaccurate but rather one where "in case after case" there was "impressive language which would justify large bills" but which in fact was untrue. (Tr. 1475-77; A. 200-02). This observation was clearly correct.

Time and again the descriptions in Capanegro's bills were simply and blatantly false. He billed for people who were represented by other attorneys. He billed for people he never met or spoke with. He billed for legal

would be. (Tr. 515-21, 797-816, 1004-06, 1446, 1450-52, 1454-55, 1469-71, 1475-77; A. 161-202). On one count, Judge Griesa acquitted though finding that the charges were high considering the minimal service performed. (Count 4; A. 11).

briefs he never wrote, for appearances at police stations and hearings he never made. He billed before dispositions of cases and *after* dispositions of cases for representation at trials which never occurred.*

Capanegro's bills did not just contain regular boiler-plate descriptions of services to be rendered. Instead, the wording of the bills was in the past tense and varied from case to case. The pattern and frequency of misstatement, misdescription and falsehood in the bills gave rise in and of itself to an inference of fraudulent intent. *United States v. Dibrizzi*, 393 F.2d 642 (2d Cir. 1968); *Doyle v. United States*, 318 F.2d 419 (8th Cir. 1963).

Capanegro asserts that his bills simply contained good faith estimates of services he intended to perform in the future. In many of the cases, however, the bills were submitted after the fact when Capanegro must have known that the descriptions were false. For example, in the Rosso case (Ct. 1) Capanegro wrote about a police station appearance even though he already knew that he had not appeared with Rosso at the police station on Long Island. In the Radloff case (Ct. 5) Capanegro billed for preparation of legal memoranda in a situation where Radloff was merely a prospective complainant and in which Radloff had determined at least 3 weeks earlier not to file a complaint. The bills of Cassidy, Adler and Toomey (Cts. 11 and 12) were dated and submitted at least 5 days *after* dispositions of the cases by ACD or guilty plea. Yet, in each instance, the bills falsely referred to multiple court appearances and trials. Moreover, as evidenced by Capanegro's bill in the Jaszczuk case (Ct. 20), Capanegro was fully capable of billing for "contemplated" services in clear and specific language. See, *supra*, p. 40. Capanegro could as easily have used

* See, *supra*, pp. 8-9.

such clear and specific language in the other descriptions which he claims were "in futuro".*

The blatantly false description of services also belies Capanegro's claim that he was simply establishing fees based on his expertise as a criminal lawyer; an honest attorney need not falsely describe the work he has done in order to justify his fee. Indeed, given the simplicity of the union cases,** the relatively minor violations or crimes charged, and his modest professional income excluding fees from the union,*** Capanegro's own estimates of the monetary value of his legal work could fairly have been rejected as not having been made in good faith. This point becomes more apparent when one recognizes that despite his claimed expertise in criminal cases,

* To buttress the claim that his bills were simply good faith estimates of contemplated future services, defendant asserts "In no instance did Campanegro send a second bill at a later date." (Br. 12). That assertion, also made by Capanegro on direct examination at trial (Tr. 781-83), is clearly false. Capanegro submitted two bills in the case of Bruce Whyte, for \$3,900 on January 13, 1972 (GX 5; A. 95) and an additional \$3,500 on January 31, 1972 (GX 6; A. 97). See, *supra*, p. 37, n. Capanegro also submitted two bills in the case of Douglas Roper, for \$2,750 on January 31, 1972 (GX 6; A. 97) and for \$2,400 on February 17, 1972. (GX 7; A. 100) (Tr. 1182-85, 1312-15; GX 4090).

** Workmen's Compensation lawyer Alfred Udoff, who was not a criminal lawyer at all, obtained ACD's for union members Harold and Carlo (Cts. 2-3) within just a few moments of arriving in Court, even though he knew nothing about the case when he arrived. (See *supra* pp. 17-19).

*** Capanegro's total receipts from the union when measured against his tax returns established that 76 percent of his *gross* earnings for 1972 came from the union (even though the strike ended just two months into the year). (Tr. 1338-40). The comparable figure for 1971 was approximately 44 percent. (Tr. 1341-43). Capanegro also conceded that the 4½ months ending February, 1972, were the most lucrative of his professional career. (Tr. 1235-36).

Capanegro did not refer at trial to a single case, outside the union where he charged \$1,500 or \$2,000 for representing someone on disorderly conduct charges. Nor did he produce a single bill he had ever sent to a client for a comparable amount in such a case. Nor were any witnesses produced to testify that they had paid such fees to Capanegro in disorderly conduct cases.

Moreover, just as the descriptions on the bills varied from case to case for no honest reason so did the amounts of the fees and none of Capanegro's lame explanations can possibly justify these variations.* Rather, such variations can be explained only as attempts by Capanegro to suggest to post-strike auditors that the fees were set in relation to time actually spent on a particular case or as a result of fine differences in the complexity of each case. For example, none of Capanegro's explanations account for variations in bills where individuals were charged with the same offense.** The fees varied, some-

* Capanegro suggests on appeal that his fees were based essentially upon the adverse consequences of a conviction to his client. (Br. 45). That explanation clearly does not explain the disparate fees where the union members were merely complainants or possible complainants. (Cts. 4-7, 10, 23). At trial, he variously asserted that the amounts of his fees in union cases were based on the severity of the crime, charges by other attorneys in comparable cases, and his evaluation of his own self-worth. (Tr. 776-77, 1229-35, 1395-97). Upon analysis, however, none of these criteria explains the seemingly unjustified variations in the bills.

** For members charged with disorderly conduct, a violation under New York State Law, Capanegro's fees were as follows:

Rosso (Count 1) —	\$1,850
Cassidy (Count 11) —	1,375
Califra (Count 13) —	1,550
Neri (Count 15) —	1,850
Wallen (Count 16) —	2,000
Dzubay (Count 17) —	1,850
Gilbert (GX 3190) —	1,500
Adler (GX 3990) —	1,325
Fasano (GX 4190) —	1,675

times even among co-defendants for whom Capanegro submitted separate bills.* Moreover, the explanations do not explain the comparatively lower fee of \$875 in the Antonucci case which involved felonious assault with a knife.** Finally, under no theory of billing could there be any legitimate explanation for Capanegro obtaining \$1,850 from the union for the Rosso case (Ct. 1) after already deciding to have another attorney (John Clayton) represent Rosso for \$250.

Capanegro's effort to justify his billings by reference to fees charged by other attorneys cannot withstand scrutiny. For example, he contends that his bills were justified by reference to fees charged by Kaming & Cunningham for representing arrested strikers in the earlier wildcat strike. (Br., 9-10, 50).

As Chief Counsel of Local 1101, however, Capanegro negotiated a total fee of \$18,000 with Kaming & Cunningham for the criminal representation of 18 arrested strikers. That firm, prior to the time Carnivale even took office, had expended 47 hours in court. All 18 cases were actually in existence. In no case were they simply "holding themselves available". In addition, Capanegro required Kaming & Cunningham (unlike himself) to enter into a formal written contract covering the representations in criminal cases. The contract required the complete disposition of a case before the firm became entitled to

* For example, the fees varied between Dolgin and Hevenor (Cts. 6-7), Cassidy and Adler (Ct. 11), Fasano and Califra (Ct. 13), and Neri, Wallen and Dzubay (Cts. 15-17).

** Of course, even the \$875 for representing Antonucci was a little steep—\$875 too steep—given the fact that Antonucci was represented by another attorney and not Capanegro. See "Count Twenty-Two", *supra*, pp. 41-42.

fees.* The contrast with the procedures and fiscal limitations Capanegro set for himself is startling.** (Tr. 767-72, 975-87, 1505-10; GXs 46A-F; A. 140-56). See *supra* p. 6, n.

Indeed the evidence about fees charged by other attorneys points to Capanegro's guilt and not his innocence. These fees were relevant in assessing Capanegro's criminal intent to the extent they were known to him. For example, Capanegro knew that attorney John Clayton charged \$250 in mid-December, 1971 for handling Rosso's disorderly conduct charges (Ct. 1). Not only did this knowledge have no impact on the fees Capanegro charged in other disorderly conduct cases (see p. 63, n. *supra*), but it did not even inhibit Capanegro from charging the union \$1,850 himself for representing Rosso.

Also, in the record were David Rubins' \$200 bills (GXs 47A, 47B; A. 157-58) for representing union members Gallo and Goodman at weekend arraignments and the \$1,000 per case which Capanegro agreed that Kaming & Cunningham should receive when the earlier cases of the

* In addition, whereas Capanegro claims he billed "in futuro", and was promptly paid, Kaming & Cunningham did not receive most of the fees due them under their written agreements until January, 1973, many months after the cases were disposed of and after Carnivale left office. (Tr. 1020-21; GXs 48, 48A, 48B).

** The greatest contrast, of course, is that the descriptions of services rendered which Capanegro submitted proved to be false. It is also noteworthy, that Capanegro as \$25,000-a-year Chief Counsel of Local 1101, could have apparently saved the union substantial money by recommending that the criminal representations during the seven-month strike be handled at \$1,000 per case by Kaming & Cunningham or, alternatively, by the CWA's lawyers, Cohn, Glickstein, Lurie & Ostrin, at an hourly rate. See, *supra*, p. 5, n.*. Capanegro's self-dealing while in a position of trust with the union would appear to be precisely the type of conduct which Congress sought to inhibit through Section 501(c) of the Landrum-Griffin Act. See Point I, *supra*.

wildcat strikers were disposed of. Such fee comparisons are hardly helpful to Capanegro.*

Furthermore, Judge Criesa had every right to consider consciousness of guilt in determining the defendant's intent. See, *United States v. Gentile*, 530 F.2d 461, 465 (2d Cir. 1976); *United States v. Koss*, 506 F.2d 1103, 1114 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *United States v. Parness*, 503 F.2d 430, 437-38 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Jenkins*, 496 F.2d 57, 66 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). In this case such evidence was amply shown by Capanegro's crass efforts to falsify and fabricate evidence.**

Capanegro's obstructionist behavior was shown in the following ways: (1) Capanegro's attempts falsely to attribute phraseology of the bills to his secretary (see, pp. 10-12, *supra*); (2) Capanegro's attempt to impede the investigation by urging attorney John Clayton not to cooperate with the authorities under a totally fanciful theory of "attorney-attorney" privilege (see, p. 17, n., *supra*); (3) Capanegro's attempts before trial to mislead as to the true level of his services by inserting false entries in certain of the legal files which he turned over to investigators (see, footnotes at pp. 21, 24, 25, 44 *supra*);

* Richard Friedman's representation in a case involving smuggling of vast quantities of mannite (a cutting agent for heroin) which resulted in a six-day federal trial (Tr. 707-08, 720; Br. p. 46, n.2) is hardly comparable. Friedman's \$2,500 total fee for representing McAleer in a felonious assault case is more relevant. Friedman's office performed extensive work in the case, filing a written motion, interviewing several witnesses and transcribing the interviews, and having a background check made of the complainant (Tr. 708-13, 720-21; GXs 2402, 2453). Capanegro billed \$4,500 in the same case and did virtually nothing (See, "Count Twenty-Four", *supra*).

** At sentencing, Judge Griesa specifically noted that "both before and during the trial, Mr. Capanegro falsified and fabricated evidence." (Tr. Sentencing, Sept. 27, 1977, p. 12; A. 72).

and, (4) Capanegro's attempt at trial to deceive the Court as to the true extent of his services by inserting the false March 3, 1972 entry in his belatedly produced diaries (see 44, *supra*).

Finally, Capanegro seeks to avoid the consequences of his criminal activity by arguing that his innocence was established as a matter of law by Carnivale's alleged approval of Capanegro's bills. Capanegro claimed that in a private meeting with Carnivale, the Local 1101 President approved payment of up to \$2,000 in all cases involving misdemeanors and violations (Tr. 721-22, 925).^{*} In light of Capanegro's prior assertion in letters to the United States Attorney's office that "Carnivale never knew beforehand who, how, when or where a client came from or when or what the amount of a bill was to be rendered," (GXs 14A, 14B; A. 112), there was certainly no reason to credit this testimony. Capanegro's "prior approval" testimony was contradicted further by evidence of billings in excess of \$2,000 in cases involving only misdemeanors and violations.^{**}

Nor does it make the slightest difference whether the bills Capanegro submitted were designed to deceive Carnivale or, with Carnivale's acquiescence, simply to deceive

^{*} Capanegro argues that this testimony was uncontradicted. (Br. 8n). It was uncontradicted only in the sense that Carnivale, who invoked his Fifth Amendment rights (Tr. 438-39), didn't contradict it.

^{**} See, e.g., Capanegro's bills for: John Toomey (A. 97)—\$5,400, four misdemeanors (Ct. 12) (Tr. 451-68, 1160-81); Douglas Roper (A. 97, 100)—two bills, for \$2,750 and \$2,400, respectively, one misdemeanor and one violation (GX 4090; Tr. 1182-85, 1312-15); Frank Richards (A. 92)—\$3,600, three misdemeanors (GX 3290); Lawrence Johnson (A. 94)—\$2,500, two violations (GX 3690); Eric Cobb (A. 95)—\$3,700, two misdemeanors and a violation (GX 3790); John Mooney (A. 95)—\$3,650, two misdemeanors and a violation (GX 3790).

the post-strike auditors. As the District Court noted, if Carnivale himself had knowledge of and acquiesced in the fraudulent scheme,*—and thus didn't personally rely on the false statements in the bills—Capanegro would still be guilty. (Tr. 1478-80, 1499; Tr. of Sentencing, September 27, 1977, p. 6; A. 66). The crime charged was not fooling Carnivale but pilfering from the union. That crime could be committed by Capanegro with or without Carnivale's assistance.

POINT III

The Defendant's Other Claims Are Without Merit.

Capanegro advances two final arguments: 1) that the District Court reached inconsistent verdicts in violation of *United States v. Maybury*, 274 F.2d 899 (2d Cir. 1960), by acquitting on Counts 13, 14, 18 and 19 and convicting on Counts 1-3, 5-8, 10-12 and 21-24; and 2) that the settlement of the union's civil suit against him barred the criminal prosecution. Both claims are without merit.

A review of the evidence applicable to each count demonstrates that the verdicts were not inconsistent and the District Judge was simply giving Capanegro the

* Certainly, had the true facts of Capanegro's billings been known, they would not have been paid by any honest union official. See, *United States v. Silverman*, *supra* at 126-27; *United States v. Robinson*, *supra* at 493; *United States v. Dibrizzi*, *supra* at 645. Nor could any union official who was aware of the true facts have entertained a good-faith belief that the funds were being used for union business or that the union would properly ratify such expenditures if the true facts were generally known. Cf. *United States v. Santiago*, 528 F.2d 1130, 1133-34 (2d Cir. 1976); *United States v. Ottley*, 509 F.2d 667, 671 (2d Cir. 1975).

benefit of every reasonable doubt. See *United States v. Tankel*, 331 F.2d 204 (2d Cir. 1964).^{*} In many of the counts in the indictment it was undisputed that the bills preceded the rendering of any actual services in the case. It was for the Court to determine on the basis of the evidence peculiar to each count whether the Government had met its burden of proving beyond a reasonable doubt that the bill did not contain good faith estimates of work to be performed in the future. Contrary to Capanegro's argument, the District Court's acquittal on Counts 13, 14, 18 and 19, hardly meant that the Court had credited Capanegro's testimony that the items were good faith estimates of contemplated future work. Rather Judge Griesa was simply finding that on the facts pertinent to these particular counts, giving Capanegro the benefit of every reasonable doubt (A. 23), the Government had not met its heavy burden.

Moreover, Counts 13, 14, 18 and 19 each dealt with Capanegro's billing for legal work he allegedly expected to perform for the union member. Thus, the acquittals on these counts cannot be inconsistent with the guilty verdicts on Counts 5, 11, 12 and 15-17 where Capanegro was convicted for submitting fraudulent bills for legal work clearly completed at the time the bill was submitted, or on Counts 1 and 22 where the defendant collected legal fees for work other attorneys had done.

^{*} Indeed, in light of the defendant's concession that the convictions on Counts 15-17 are not inconsistent (Br. 56, n.) with the acquittals, this Court need not even reach this "inconsistent-verdict" claim under the concurrent sentence doctrine. *United States v. Mejias*, 552 F.2d 435, 444-45 (2d Cir. 1977); *United States v. Hanlon*, 548 F.2d 1096, 1099 (2d Cir. 1977); *United States v. Vasquez*, 468 F.2d 565 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); *United States v. Gaines*, 460 F.2d 176 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972). See *Anderson v. Maryland*, 427 U.S. 463, 469 n. 4 (1976).

Capanegro's claim that the Government was barred by principles of collateral estoppel from basing the instant prosecution upon facts which were involved in the union's civil suit against him must fail because the United States was not a party to the civil suit.* This Court has held that a prior adverse suppression decision in state court does not collaterally estop the United States, "not a party to the State action from using the evidence in a federal proceeding". *United States v. Mejias*, 552 F.2d 435, 444 (2d Cir. 1977). It inevitably follows that a criminal prosecution cannot be barred by a civil settlement in which no government is a party, and where no facts are judicially determined.

Nor do consecutive civil and criminal prosecutions do violence to the statutory scheme as Capanegro suggests. (Br., p. 61). Just as in the case of the federal securities laws, there is nothing in the statutory scheme of the Landrum-Griffin Act to suggest that the civil and criminal provisions were intended as mutually exclusive. Indeed as the District Court observed Capanegro was in a position of high trust within the union and he breached that trust. (Tr. of Sentencing, Sept. 27, 1977, p. 12; A. 72). Capanegro wilfully and knowingly embezzled thousands of dollars from his client and thereafter compounded his original criminal acts by falsifying and

* On December 18, 1975, Capanegro learned that his efforts to attribute authorship of the fraudulent bills to his secretary had been unmasked by the Grand Jury. The following week he settled the civil suit which the union had instituted. See, *supra*, pp. 11-12. (A. 134-39). The union's complaint in the civil suit referred to only five of Capanegro's bills. (Tr. 1393; DX C). At no time in the court below did the defense specify which facts it contended the Government was estopped from proving. Indeed, at trial it appeared that the defense had abandoned its collateral estoppel claim. (Tr. 153, 1495).

fabricating evidence. Clearly, the sanctions of the criminal law were well deserved.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Southern District of New York,
Attorney for the United States
of America.*

DON D. BUCHWALD,
PAMELA CHEPIGA,
RICHARD WEINBERG,
*Assistant United States Attorneys,
Of Counsel.*

* The Grand Jury which indicted Capanegro heard the testimony of 68 witnesses and had more than 175 documentary exhibits presented to it. From Capanegro's correspondence, the Grand Jury was also aware of the existence and settlement of the civil suit. It indicted with full knowledge of Capanegro's contentions with respect to "in futuro" billing and with full knowledge of the settlement. (See Affidavit of Assistant United States Attorney Don D. Buchwald, dated December 14, 1976, ¶¶ 6-7, submitted in opposition to Capanegro's pretrial motions).

AFFIDAVIT OF MAILING

State of New York)
County of New York)

DON D. BUCHWALD

being duly sworn
deposes and says that he (~~she~~) is employed in the office of the
United States Attorney for the Southern District of New York.

Stating also that on the 30th day of January, 1978
he (~~she~~) served a copy of the within appellate brief
by placing ^{two copies of} the same in a properly postpaid franked envelope
addressed:

Prof. Henry Putzel III
Fordham Law School
140 West 62 Street
New York, New York 10023

And deponent further says that he (~~she~~) sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Attorney's Office, Southern District of New York, One
St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of
Manhattan, City of New York.

Don D. Buchwald

Sworn to me before this

30th day of January, 1978.

Pamela R. Chepiga
Notary Public

PAMELA R. CHEPIGA
Notary Public, State of New York
No. 31-4621391
Qualified in New York County
Commission Expires March 30, 1979